

Missouri Attorney General's Opinions - 1961

Opinion	Date	Topic	Summary
1-61	Dec 8	ADMINISTRATIVE LAW. ADMINISTRATIVE AGENCIES. ADMINISTRATIVE RULES. PHARMACISTS. PHARMACY. PHARMACY BOARD. REGULATIONS.	Pharmacy Board may not by regulation require drug stores to have a licensed pharmacist present at all times when they are open for business.
2-61	Mar 2	INCOMPATIBILITY OF OFFICES. COUNTY HOSPITAL TRUSTEE. CITY OFFICERS. CITIES, TOWNS AND VILLAGES. PUBLIC OFFICERS. MAYORS. CITY CLERKS.	Mayor or city clerk of 4 th class city or member of board of public works of special charter city may be member of Board of Trustees of county hospital when hospital is not located in any of such cities.
2-61	May 25	PROBATE COURT. INHERITANCE TAX.	While proceeding under heirship determination statute, the probate court should invoke its jurisdiction to assess inheritance tax on its own motion.
2-61	June 14	Hon. A. J. Anderson	WITHDRAWN
2-61	Sept 5	HOSPITALS. COUNTY HOSPITALS.	The board of trustees of a county hospital is authorized to purchase a tract of land for use as a hospital site with the sole consideration therefor being that the grantor be guaranteed lifetime hospitalization as may be required.
2-61	Oct 18	TRUSTS. TAXATION. INHERITANCE TAX.	Bequests to person for purpose of caring for testator's cat held taxable under Missouri Inheritance Tax Law.
3-61	Apr 4	SCHOOLS. SCHOOL TAX LEVIES. CONSTITUTIONAL LAW.	Section 11(c), Article X of the 1945 Missouri Constitution, as amended, and Section 165.080, RSMo 1959, do not require that all proposed tax rate increases for school purposes be submitted to the voters in one single proposition.

		TAXATION. ELECTIONS.	
3-61	May 22	TAX SALES REDEMPTION.	Since the county collector has no duty or authority to collect delinquent city taxes in a city of the third class, he is under no obligation or statutory duty to check to see whether city taxes accruing subsequent to the sale of realty by the county collector for delinquent county and state taxes have been paid by the certificate holder before permitting the owner to redeem the property.
3-61	Dec 8		Opinion letter to the Honorable Roderic R. Ashby
4-61	Oct 31		Opinion letter to the Honorable Lee Aaron Bachler
6-61	July 28	TEACHERS. TEACHERS' CERTIFICATES. SCHOOLS. COUNTY SUPERINTENDENT OF SCHOOLS.	Teachers' certificates are valid when issued and (except for county third grade certificates) the local County Superintendent of Schools does not have authority to require such certificates to be registered or recorded with him, and the county superintendent of schools does not have the power to pass on the moral character and requirements, other than scholastic, of the teacher, (except teachers holding county third grade certificates).
6-61	Oct 9	DEPOSITIONS. NONRESIDENT PLAINTIFF. EVIDENCE. MAGISTRATE COURT.	If a plaintiff in a civil action in magistrate court is a nonresident of the State of Missouri and not present at trial, his deposition may be used to prove his case, provided he has complied with the statutory procedural matters relating to the taking of said deposition, as well as to its introduction during trial.
6-61	Nov 17		Opinion letter to the Honorable Paul S. Bell
9-61	Mar 23	COUNTIES. COUNTY OFFICERS.	Class 2 county officers are not authorized by the provisions of Section 50.660 to make purchases of \$100.00 or less without approval of county court and certification of county auditor.
9-61	July 10		Opinion letter to the Honorable Earl R. Blackwell
9-61	Oct 3		Opinion letter to the Honorable Channing D. Blaeuer
9-61	Oct 6		Opinion letter to the Honorable Earl R. Blackwell
9-61	Nov 8	ROAD DISTRICTS. COUNTY COURTS. COUNTIES. ROADS AND BRIDGES.	Both a County Court and Special Road District (authorized under Section 233.010 RSMo 1959) may expend funds, under authority of Section 234.210 RSMo 1959, to finance a preliminary engineering survey, the purpose of which is to determine the feasibility of constructing an inter-state bridge across the Mississippi River.
10-61	May 24	COUNTY HEALTH CENTERS. COUNTIES.	Board of health center trustees managing county health center governed by Secs. 205.150 RSMo 1959 is vested with authority to expend monies derived from its authorized tax levy for the purpose of erecting a health center building on premises leased from the Federal

			Government.
10-61	July 7		Opinion letter to the Honorable Rolin T. Boulware
10-61	Aug 29		Opinion letter to the Honorable Earl A. Bollinger
10-61	Oct 19	TAXATION. TAX EXEMPT REALTY. CHARITABLE PURPOSES. EXCLUSIVELY USED FOR CHARITABLE PURPOSES.	On the facts submitted, real estate owned by Cat's Pause, a not for profit corporation in Shelbina, Missouri, is used for purposes purely charitable.
11-61	Apr 4	CRIMINAL LAW. BONDS. SUPREME COURT RULES. SURETIES. BAIL BONDS. MUNICIPAL COURTS.	A person is not disqualified as a surety in municipal and traffic courts solely because he employs persons who have been convicted of a felony but this fact together with other facts and circumstances may be considered by the court in determining whether the person meets the reputable person requirement of Section 37.107, Rules of the Supreme Court of Missouri.
11-61	July 17	NONSUPPORT. CHILDREN. WIFE. VENUE.	A criminal action for nonsupport of children brought against a father pursuant to Section 559.350, RSMo 1959, can be instituted in the county wherein the father resides even though the children are nonresidents of the state.
13-61	Dec 4		Opinion letter to Mr. Arthur V. Burrowes
14-61	Mar 27	Hon. E. J. Cantrell	WITHDRAWN
15-61	Sept 8	SURPLUS COMMODITIES. COUNTY COURTS. COUNTY OFFICERS. COUNTY CLERK. COUNTY TREASURER. COUNTY SUPERINTENDENT OF SCHOOLS.	Judges of the county court are prohibited from receiving extra compensation from county for services they render in distribution of surplus commodities. County clerk and county treasurer may receive extra compensation from the county for services they render beyond their official duties in the distribution of surplus commodities. County superintendent of schools may receive compensation from the county for any service he renders in the distribution of surplus commodities.
15-61	Dec 8		Opinion letter to the Honorable Milton Carpenter
17-61	Dec 22		Opinion letter to the Honorable Jack L. Clay
18-61	Jan 26	NEPOTISM.	Employment by County Judge on hourly or monthly basis of park employee who later marries relative of judge during period of his employment does not constitute violation of Article 7, Section 6 of Constitution 1945. Signing employee's payroll for service performed

			does not constitute an employment.
18-61	Feb 15	REPUTABLE PERSON. CRIMINAL LAW. BONDS. SUPREME COURT RULES.	"Reputable person" to be surety on bond is one of good moral character. Specific acts may be shown in making such determination.
18-61	Apr 26	RAILROADS. TAXES.	1. Railroad property is to be assessed only by the taxing units where the property is located. 2. Only the taxing units for which railroad taxes were levied and collected are entitled to the taxes collected.
19-61	July 5		Opinion letter to the Honorable Cornelius Costello
19-61	July 7	TAXATION. REAL PROPERTY. TIMBER INTERESTS.	Standing timber conveyed by a timber deed is real estate and may be separately assessed to the grantee, but such separate assessment is not mandatory.
19-61	July 17		Opinion letter to the Honorable Roy G. Cooper
19-61	Aug 1	GENERAL ROAD DISTRICTS. ROAD DISTRICTS. COUNTY BUDGET LAW. ROAD AND BRIDGE FUND.	All funds derived from both the first and second additional road levies in general road districts must be budgeted and may be spent only from class 3 of the budget in class 3 counties; the funds from the second additional road levy in several such general road districts may not be consolidated, but must be earmarked to the credit of each such district and may be expended only on roads or for the payment of protested warrants resulting from expenditure for roads within said district; county treasurer incurs no liability by paying or protesting warrants issued in accord with the budget estimate filed with him.
20-61	Mar 16	COUNTY HEALTH CENTERS. COUNTY COURTS. HEALTH CENTER BUDGET.	County health center in county of fourth class has no power, as such, to borrow money. County courts of such county, upon request of board of health center trustees, may in its discretion issue tax anticipation notes payable out of the health center fund. Board of health center trustees may incur indebtedness and issue duly authenticated vouchers therefor upon which the county court must order vouchers drawn on the health center fund even though there is no money presently in said fund, provided said indebtedness has been duly provided for in the county health center budget.
20-61	May 19	STATE RETIREMENT ACT. STATE EMPLOYEES. MUNICIPAL EMPLOYEES. UTILITIES. CONSTITUTIONAL	The General Assembly may constitutionally amend the Missouri State Employees' Retirement System (Sections 104.310 to 104.600, RSMo 1959) by granting prior service credit to a city employee for service rendered by him as an employee of a private utility prior to the date said private utility became municipally owned, when said city properly elects to place its employees under the provisions of the Missouri State Employees' Retirement System.

		LAW.	
20-61	Dec 28	CORONERS. PUBLIC ADMINISTRATORS. SUCCESSOR. GOVERNOR. TERM. CITY OF ST. LOUIS.	When the office of coroner of the City of St. Louis becomes vacant it is the duty of the Governor to appoint a successor who shall serve until the end of the four year term to which the one vacating the office was elected. As the office of public administrator of the City of St. Louis is vacant it is the duty of the Governor to appoint a successor who shall serve until the first day in January, 1963, at which time the person having been elected at the November, 1962, general election shall take office and serve for the remainder of the unexpired term; i.e., until the first day in January, 1965.
21-61	Mar 2	SCHOOL BUS. VEHICLES, MOTOR. HIGHWAYS. TRAFFIC.	Driver of school bus must stop his bus on the unpaved portion (shoulder) of the highway in discharging or taking on passengers, except when impracticable to do so. In event that it is impracticable to stop on shoulder of road, he may stop school bus on paved portion of highway only if school bus is plainly visible for at least 300 feet in each direction to drivers of other vehicles upon the highway. In such event, he may stop bus on paved portion of highway for only such time as is actually necessary to take on and discharge passengers.
21-61	Oct 4	COUNTY COURTS. ASSESSMENT OF PROPERTY FOR TAXATION. TAXATION. CLASS THREE COUNTIES OF OVER 40,000. ASSESSORS.	Any county having a population over 40,000 is authorized to employ experts to replat and prepare maps and to locate and evaluate real estate in said county for the purpose of furnishing information of value to the county assessor in securing a full and accurate assessment of all property in the county liable to taxation.
21-61	July 10		Opinion letter to the Honorable Bill Davenport
21-61	July 20		Opinion letter to the Honorable Bill Davenport
21-61	Dec 20	Hon. John M. Dalton	WITHDRAWN
24-61	Nov 13	PUBLIC SCHOOL RETIREMENT SYSTEM. INVESTMENT FUNDS. LIFE INSURANCE COMPANIES. CASUALTY INSURANCE COMPANIES. STOCKS.	Since House Bill 214 amending Section 169.040, RSMo 1959, became effective on October 13, 1961, the Board of Trustees of the Public School Retirement System of Missouri are authorized to invest funds of the system which are in excess of a safe operating balance in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

25-61	Jan 3	STATE MENTAL HOSPITALS. DISCHARGED CONVICTS. PENAL INSTITUTIONS. CONVICTS, ALLOWANCE WHEN DISCHARGED. PENITENTIARY.	Superintendent of the hospital in his sole discretion may furnish all or any part of the allowances provided in Section 216.350, V.A.M.S. to a convict when discharged, provided the convict is discharged from the hospital at the time his sentence in the penal institution expires. A prisoner confined in a penal institution when paroled or discharged therefrom is entitled to all allowances provided for in Section 216.350, V.A.M.S.
25-61	Jan 16	TRAINING SCHOOLS. STATE TRAINING SCHOOLS. JUVENILE COURTS.	Children committed to a State Training School for mentally retarded children by the juvenile court shall be accepted by said school subject to availability of suitable accommodation at the school.
25-61	Sept 5	IMMUNITY OF STATE FROM SUIT. STATE HOSPITALS. DIVISION OF MENTAL DISEASES.	The State of Missouri is not liable or subject to suit for damages when personal property of employees at state mental hospitals is stolen or damaged by state hospital patients.
26-61	May 19	COUNTY BUDGET. COUNTY BUDGET LAW. COUNTIES. COUNTY COURT.	County Court of third Class county may expend funds not otherwise allocated out of class 5 of annual budget for the acquisition, storage and distribution of surplus agricultural commodities under a program authorized by Senate Bill 143, 71st General Assembly; if funds in Class 5 are insufficient, county court may supplement financing with Class 6 funds, as long as there is cash on hand in excess of funds already encumbered and amounts allocated to Classes 1 to 5.
27-61	Mar 9	MAGISTRATE COURT. CHANGE OF VENUE. BAIL BOND.	Upon a change of venue to a circuit court or to another magistrate court, a cash bond previously posted remains in effect, obviating the necessity for a new bond to insure the defendant's presence in the transfer court.
27-61	July 5	Hon. William J. Esely	WITHDRAWN
27-61	Nov 15		Opinion letter to the Honorable Lynn M. Ewing, Jr.
28-61	Feb 15	SCHOOLS. SUPERINTENDENT AS TRANSPORTATION SUPERVISOR. THIRD CLASS COUNTIES. COMPENSATION WHEN PAID.	Section 167.220 R.S.Mo. 1959 requires Treasurer of third class county to pay amount of monthly compensation therein provided to superintendent of schools of county as supervisor of school transportation out of funds received from State of Missouri for that purpose. Treasurer unauthorized to make any such payments to superintendent, as school transportation supervisor, before receipt of funds for that purpose from State of Missouri.
28-61	Mar 22	STEALING.	The possessor of property pursuant to a trust receipt executed by him

		CRIMINAL LAW. BAILMENT. TRUST RECEIPTS. PROPERTY.	can be prosecuted for stealing under Section 560.156 MRS 1959, if he converts said property in violation of the owner's title, possessory rights, or terms of the trust receipt.
28-61	June 30	SENATORIAL REDISTRICTING COMMISSION.	The commission must file its report not later than August 14, 1961. If state senatorial reapportionment is properly accomplished this year, the result will be (1) that the present senators will serve the balance of their present terms, through 1962 or 1964, depending upon whether they were elected in 1958 or 1960, (2) that senators will be elected in 1962 from the new even-numbered districts, (3) that senators will be elected in 1964 from the new odd-numbered districts, and (4) the senate in 1963 and 1964 will consist of the senators elected in 1960 from the old odd-numbered districts and those elected in 1962 from the new even- numbered districts.
31-61	July 26	SCHOOLS. SCHOOL DISTRICTS. COUNTY COURTS.	Land in Howell County is not "unorganized" territory and county court therefore cannot place it in another school district.
31-61	Sept 14		Opinion letter to the Honorable J. R. Fritz
31-61	Oct 24	COUNTIES. COUNTY JUDGES. COUNTY OFFICERS. MILEAGE.	County Judges of third and fourth class counties are not entitled to the increased per diem compensation provided by House Bill 255, 71st General Assembly, but are entitled to the increased mileage allowance therein provided.
31-61	Dec 28	COUNTY OFFICERS. SHERIFFS. MILEAGE. FEES AND SALARIES.	Sheriffs are not entitled to a mileage allowance under Section 57.430, RSMo when assisting a sheriff of another county in a criminal investigation with which the first sheriff's county is not concerned.
32-61	Oct 5		Opinion letter to the Honorable J. Ben Garrett
33-61	July 7	Hon. William E. Gladden	WITHDRAWN
33-61	Dec 22	INSURANCE.	Contract Number 1515 negotiated by Duncan Funeral Homes is not on its face an insurance contract, but negotiating of the same in the light of language found in the letter of Duncan Funeral Homes, dated May 19, 1961, causes Contract Number 1515 to evidence an insurance contract, offered in violation of Secs. 375.300 and 375.310, RSMo 1959.
34-61	July 25	COUNTY TREASURERS. COUNTY COURTS. COUNTY BUDGET.	County treasurer must pay or protest warrant drawn on fund properly budgeted even though anticipated revenues as budgeted may exceed revenues actually collected.

		WARRANTS.	
37-61	June 1	Hon. Morran D. Harris	WITHDRAWN
37-61	July 21	ROAD DISTRICTS. CONSERVATION COMMISSION. DISSOLUTION OF ROAD DISTRICTS. CREATION OF ROAD DISTRICTS.	Land owned by State Conservation Commission does not count in the total acreage of an area for the purposes of determining whether landowners petitioning for the creation or dissolution of a special road district own at least 50% of the acreage as required by law.
38-61	Apr 21	PUBLIC RECORDS. MICRO-FILMING. ORIGINALS DESTROYED BY SECRETARY OF STATE, WHEN.	Sections 109.120 and 109.130, RSMo 1959 authorize Secretary of State to micro-film permanent records of articles of incorporation with amendments, of “inactive” domestic and foreign corporations and fictitious names records five or more years old, and deem reproductions originals. Reproductions to be placed in conveniently accessible files for preservation and examination. He may certify facts to governor and if governor orders destruction of records from which reproductions made, secretary of state may destroy same.
38-61	June 28		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Joint Resolution No. 2
38-61	June 28		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Committee Substitute for House Joint Resolution No. 24
38-61	July 5		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Joint Resolution No. 9
38-61	July 12		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Joint Resolution No. 16
38-61	July 12		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Joint Resolution No. 27
38-61	July 12		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Joint Resolution No. 30
38-61	July 13		Opinion letter to the Honorable Warren E. Hearnese – Ballot title for House Committee Substitute for House Joint Resolution No. 3
38-61	Sept 29	CITIES, TOWNS AND VILLAGES. LEGAL PUBLICATIONS. FINANCIAL STATEMENTS.	A newspaper in which a third class City’s financial reports are published in accordance with Section 77.110 must meet the requirements set out in Section 493.050. A newspaper having two hundred subscribers would qualify, assuming that such newspaper contains news of general character and interest to the community, as a newspaper of “general circulation” within the purview of Section 493.050.

38-61	Nov 30		Opinion letter to Mr. Edward E. Haynes
38-61	Dec 20	Hon. Warren E. Hearnese	WITHDRAWN
39-61	May 15	PUBLIC SCHOOL RETIREMENT SYSTEM. MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM. MEMBERS OF THE GENERAL ASSEMBLY. LEGISLATORS.	A member of the General Assembly who is covered by the retirement or benefit fund of the Public School Retirement Fund cannot also become a member of the Missouri State Employees' Retirement System.
39-61	Aug 24	NATIONAL GUARD. MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM.	A civilian employee of the Missouri State National Guard is entitled to the full benefits under the Missouri State Employees' Retirement System (Sections 104.310 to 104.660, RSMo 1959), notwithstanding the failure of the Federal Government to match said employees' four per cent contribution.
39-61	Oct 19	STATE EMPLOYEES. RETIREMENT. STATE RETIREMENT SYSTEM.	Those members retired prior to the effective date of the amendment to Section 104.390, V.A.M.S. 1961, increasing the normal annuity of a member from 5/6ths of one per cent to one per cent are not entitled to said increase in benefits.
39-61	Nov 28	STATE RETIREMENT SYSTEM. COMMON STOCK. INVESTMENT FUNDS. LIFE INSURANCE COMPANIES. CASUALTY INSURANCE COMPANIES.	The Board of Trustees of the State Retirement System may invest funds of the System in common stock of any corporation organized under the laws of the United States, or of any state, subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.
40-61	Apr 5	REPRESENTATIVE REDISTRICTING. CENSUS. SECRETARY OF STATE. CONSTITUTIONAL LAW. COUNTY COURTS. BOARD OF ELECTION COMMISSIONERS. COUNTY COUNCIL OF ST. LOUIS COUNTY.	Process of effecting reapportionment of representatives must commence without delay upon the taking of the census. Secretary of state must make the necessary certification forthwith, and upon receipt of such certification, when redistricting is required, the county courts and board of election commissioners in the City of St. Louis must effect such redistricting within 60 days if possible by acting with expedition and due diligence. Statutory requirement that redistricting be completed within 60 days is directory, and a redistricting thereafter completed would be valid. In St. Louis County, county council performs the function of a county court in redistricting the county.
41-61			

40-61	May 31	SENATORIAL APPORTIONMENT COMMISSION. COMPENSATION OF MEMBERS.	Under provisions of Article III, Section 7, Constitution of Missouri, member of Senatorial Apportionment Commission shall be paid fifteen dollars a day from effective date of his appointment and qualification, until date commission completes assignment, but total compensation cannot exceed one thousand dollars. If commission's assignment is not completed and it is discharged at end of six month's period provided in section, a commissioner shall be paid fifteen dollars a day from effective date of his appointment and qualification, but total compensation cannot exceed one thousand dollars.
41-61	Mar 6	FELONY. STEALING. EMBEZZLEMENT. LARCENY. THEFT. CRIMINAL LAW.	A series of independent thefts or embezzlements by an individual from one owner at different times which thefts or embezzlements, independently, do not equal the sum of at least \$50.00, can be pleaded in the aggregate in order to charge the individual with stealing in a sum of at least \$50.00 under Section 560.156 MRSA 1959, only in the event that the facts would show a single criminal purpose on the part of the thief or embezzler at the time of the thefts or embezzlements.
41-61	Apr 4	COUNTY OPTION DUMPING GROUND LAW. STATE DIVISION OF HEALTH. COUNTY COURT. MUNICIPAL CORPORATIONS. "PERSON".	Both State Division of Health and County court have authority to enforce provisions of sections 64.460 to 64.487, MoRS 1959; all disposal areas outside the limits of cities, towns and villages must be licensed. Any person who disposes of ashes, garbage, rubbish or refuse in an unlicensed area is guilty of a misdemeanor.
41-61	Sept 12		Opinion letter to the Honorable William W. Hoertel
41-61	Oct 19	TAXATION. LANDLORD AND TENANT. FRATERNITIES.	Building used to house a college social fraternity is not used for charitable or educational purposes within the meaning of Section 6 of Article X of Missouri Constitution. Corporation leasing such property from exempt governmental agency is liable for taxes to extent of its interest therein.
42-61	Jan 16	Hon. John A. Honssinger	WITHDRAWN
42-61	Nov 8	BAIL. SHERIFF. MAGISTRATE. ARREST.	Supreme Court Rule 37.485 empowers the sheriff of the county in which the offense was committed, to set and take the amount of bail, which shall not be less than sixteen dollars nor more than two hundred dollars in accordance with the bail schedule established by the magistrate having jurisdiction over the offense, only in those cases where the magistrate court is not in session at the time, and the arrest of the person is without a warrant for a misdemeanor involving the operation of a motor vehicle.

42-61	Dec 11	ANTI-TRUST. MONOPOLIES. PRICE FIXING. AGREEMENT TO FIX PRICES. COMBINATIONS IN RESTRAINT OF TRADE.	An agreement by retail gasoline filling stations to fix prices at which they sell gasoline violates the Anti-Trust Laws of Missouri contained in Chapter 416, RSMo 1959.
43-61	Apr 21	COUNTIES. COUNTY COURTS. COUNTY CLERKS.	Presiding judge of county court is without authority to order clerk to make a record entry showing the judge's presence during a previously adjourned session of the court. Presiding judge, acting alone, may not order clerk to issue a warrant.
44-61	Sept 20	STATE DIVISION OF RESOURCES AND DEVELOPMENT. RESOURCES AND DEVELOPMENT.	The division of resources and development has authority to provide planning assistance to any county, municipality, or metropolitan area and exercise all the power and authority granted under the provisions of Sections 255.130, 255.140, and 255.150, RSMo 1959.
45-61	May 10	CONSTITUTIONAL LAW. LEGISLATION. EASEMENTS. STATE PARK BOARD.	Constitutional prohibition against special or local laws laying out roads, highways, streets or alleys does not apply to private road.
45-61	June 30		Opinion letter to the Honorable Darold W. Jenkins
45-61	July 26		Opinion letter to the Honorable Joe A. Jackson
45-61	Oct 12	SHERIFF. COUNTY COURT. TRAVEL ALLOWANCES.	The county court is not authorized to pay the sheriff's and deputies' travel allowances by giving them the equivalent of \$75.00 per month in gasoline instead of paying such allowances by the means directed by Sections 57.430 and 57.440, RSMo 1959.
46-61	Apr 12	POLITICAL COMMITTEE. PARTY COMMITTEE.	Officers chosen by county committee under Section 120.800 RSMo., 1959, are elected for an indeterminate term.
48-61	Dec 20	Hon. Harry Keller	WITHDRAWN
49-61	Apr 13	AGRICULTURE. ADMINISTRATIVE RULES. FERTILIZER.	Director of Missouri Agricultural experiment station at Columbia, Missouri, having the authority to promulgate regulations under the Missouri Fertilizer Law, Sections 266.291 to 266.351, RSMo 1959, may not, in the exercise of such power add to the labeling requirements of Sec. 266.321, RSMo 1959, because such action would be adding to the Fertilizer law and adding to its scope.

49-61	Nov 6	AIRPORTS. CITIES OF THIRD CLASS. CITIES OF THIRD CLASS WITH CITY MANAGER FORM OF GOVERNMENT. CITY MANAGER. CITY COUNCIL.	The city council of a city of the third class with city manager form of government has authority to create an airport board to maintain and operate a municipal airport.
50-61	July 7		Opinion letter to the Honorable Paul Knudsen
50-61	Dec 18		Opinion letter to Mr. Paul Knudsen
51-61	July 19	COUNTY HOSPITAL. PHYSICIAN. PATIENT IN COUNTY HOSPITAL.	A regularly licensed and qualified physician who has been a member of the staff of the Callaway County Hospital and who has voluntarily resigned from said staff, may nevertheless continue to practice in the hospital when acting for his patient in the hospital.
51-61	Aug 11	TAXATION. STATUTES. CONSTRUCTION OF STATUTES. CONSTITUTIONAL LAW.	Senate Substitute No. 2 for Senate Bill No. 78, effective October 13, 1961, has no retrospective effect and does not operate to forgive taxes which were assessed under the law in effect prior to said date.
51-61	Oct 4	MAGISTRATES. EXECUTIONS.	Magistrate may issue execution directed to sheriff of another county for purpose of making levy or garnisheeing of judgment debtor.
52-61	Jan 3	INSURANCE.	Amended Articles of Incorporation of American Standard Life Insurance Company.
52-61	Jan 30	INSURANCE.	Articles of Incorporation of Missouri General Insurance Company.
52-61	Mar 14	INSURANCE. TAXATION.	Foreign insurance company doing business in Missouri prohibited under Sec. 148.400 RSMo 1959 from deducting from premium taxes due Missouri amounts paid as ad valorem taxes on real estate the company owns in Missouri, and, other than for the purpose of computing premium taxes under a foreign premium tax statute which authorizes the deduction thereof, such real estate taxes are not to be taken into consideration in determining the aggregate burdens imposed by either Missouri or the foreign state when applying the provisions of the Missouri retaliatory law.
52-61	Apr 12	INSURANCE.	Articles of Incorporation of First National and Casualty Insurance Company.
52-61	Apr 25	COUNTY OFFICERS. COUNTY CORONERS.	Person cannot qualify for office of county coroner by becoming a citizen one month after the beginning of the term.

		QUALIFICATION. CITIZENSHIP.	
52-61	Aug 16	INSURANCE.	Described “plan” offered by Southwest Blood Banks, Incorporated, is a contract of insurance, and offering of the same to the public without meeting licensing requirements of Missouri’s insurance code violates Sections 375.300 and 375.310 RSMo 1959.
52-61	Aug 22	INSURANCE.	Sec. 375.300 RSMo 1959 requiring licensing of insurance agents not applicable to Standard Oil Company of Indiana in its exclusive use of the mails in soliciting its credit card customers in Missouri from the office of Standard Oil Company in Illinois to purchase insurance and pay for the same through the medium of such credit cards.
52-61	Sept 6	Hon. C. Lawrence Leggett	WITHDRAWN
52-61	Sept 18	INSURANCE.	Amended Articles of Incorporation of Survivor’s Benefit Insurance Company.
52-61	Sept 18	INSURANCE.	Articles of Incorporation of United Investors Life Insurance Company.
52-61	Nov 7	CHILD. JUVENILE COURT. JUVENILES. MAGISTRATE COURT. POLICE COURT.	Pursuant to Section 211.061(2) RSMo 1959, a magistrate or police judge must forthwith transfer the case or refer the matter of an individual between 17 and 21 years of age charged with the violation of a state law or a municipal ordinance committed by said individual after he attained 17 years of age, to the juvenile court, if the juvenile court had obtained exclusive original jurisdiction of said individual under Section 211.031 RSMo 1959, prior to his seventeenth birthday, and had placed said individual on probation.
55-61	Feb 15	CIVIL DEFENSE.	Constitutional Amendment #1 adopted November 8, 1960, provides in Section 46 of the Amendment that emergency powers are granted to the Legislature only after an enemy attack. If the Legislature passes laws with such emergencies in view before an enemy attack, it must do so within the powers presently granted to that body and the constitutional restrictions ordinarily imposed upon any legislation.
56-61	Apr 4	Hon. Elva D. Mann	WITHDRAWN
58-61	Mar 10	CIRCUIT COURT. OLD RECORDS. OLD RECORDS, STORAGE OF.	Old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal are records belonging to office of the circuit clerk, and shall be kept at clerk’s office within meaning of Sec. 483.065 RSMo 1949, and cannot be removed except in case of danger from invading enemy as provided by Sec. 483.070, RSMo 1949. To provide additional space for more current records, clerk may remove said old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal from their usual places in his office and store

			them in another room of same office without violating Sections 483.065 and 483.070, RSMo 1949, if right of access and control over storage room is in clerk only, and room is not used jointly by clerk and other county officials.
58-61	May 16	STATE FEDERAL SOLDIERS. HOME.	Section 212.120 RSMo 1959 does not grant authority to board of trustees of Federal Soldiers' Home at St. James, Missouri to sell any portion of land contained in the original conveyance to said board of trustees for a site for said institution in 1897, and any sale thereof may not be made without specific legislative authority reflected by statutory enactment.
58-61	Sept 15		Opinion letter to the Honorable Richard E. McFadin
59-61	Apr 13	Hon. Paul McGhee	WITHDRAWN
59-61	Nov 10		Opinion letter to the Honorable T. D. McNeal
59-61	Nov 17	ROAD DISTRICTS. SPECIAL ROAD DISTRICTS. ROADS AND BRIDGES. ATTORNEYS.	Attorney employed by private citizens for purpose of advocating disincorporation of a road district may not be paid from funds of district.
62-61	Mar 7	COUNTIES.	Section 137.177, R.S. Mo, Amm 1957, adopted by a class three county ceases to be in force and effect when the county becomes a class two county.
62-61	May 26	OFFICERS. CIRCUIT CLERKS. COMPENSATION. TERMS OF OFFICE. CONSTITUTIONAL LAW.	A person elected to fill an unexpired portion of the term of a circuit clerk is not entitled to an increase in compensation pursuant to a statute enacted during the term of office but before his election thereto. The increase does not become effective until the expiration of such term.
62-61	June 30	COUNTIES. COUNTY AUDITORS. AUDITORS.	The auditor of Jefferson County, appointed January 1, 1961, is filling out an unexpired term of office, and is not, therefore, entitled to the increased compensation authorized by Laws 1959, S. B. 196, Section 1 (Now Section 55.090, RSMo 1959).
62-61	Dec 28	COUNTY COURTS. COUNTY CLERK. COUNTY AUDITOR.	<ol style="list-style-type: none"> 1. A valid contract executed by a county court is valid and binding on the succeeding court. 2. A county clerk is not entitled to any extra compensation for performing additional duties imposed upon him by law in conducting and supervising the registration of voters. 3. A county auditor in a third class county is not personally liable unless he makes an erroneous certification.
63-61	Feb 17	FLORIDA RESIDENT.	Florida resident employed in State of Missouri must register and

		MOTOR VEHICLES. REGISTRATION. HIGHWAYS.	license his motor vehicle in Missouri in order to operate said motor vehicle on the highways of this state, while so employed.
63-61	June 28	ROADS. SPECIAL ROAD DISTRICTS. KING BILL ROAD. COUNTY AID ROAD FUND.	Funds made available by the County Court and funds from the county aid road fund (King Bill Road Law) may be used to construct an approved road regardless of whether such road lies wholly or in part in a special road district.
64-61	July 5		Opinion letter to the Honorable George H. Morgan
64-61	Sept 1		Opinion letter to Mr. M. E. Morris
64-61	Sept 13	MOTOR VEHICLE SAFETY RESPONSIBILITY UNIT. PUBLIC RECORDS.	Citizens of Missouri have the right to make personal inspection of accident reports and be apprised of the security filed with the Motor Vehicle Safety Responsibility Unit.
64-61	Oct 4	TAXATION. INCOME TAX. ST. LOUIS EARNINGS TAX. EXEMPTIONS.	Section 143.160, as amended, provides for a deduction for those taxes paid to the City of St. Louis upon compensation for personal services earned by resident and non-resident individuals.
64-61	Nov 10		Opinion letter to the Honorable George H. Morgan
64-61	Dec 27	LEGISLATIVE DISTRICTS. SENATORIAL REDISTRICTING. REPRESENTATIVE REDISTRICTING. DECLARATION OF CANDIDACY. FILING FEE OF CANDIDATES. VOTING MACHINES. ELECTIONS.	A declaration of candidacy for nomination as senator or representative in Jackson County filed prior to the creation of the new senatorial and representative districts after the 1960 census is a nullity. The filing fee paid with such invalid declaration may be applied to a valid declaration of candidacy thereafter filed.
68-61	Aug 14	TAXATION. ASSESSMENT OF PROPERTY. LANDLORD. TENANT.	Improvements on leased land normally to be assessed against the owner thereof. Lessee's leasehold interest may be assessed separately as realty.
68-61	Aug 30	STRAY ANIMALS.	The sheriff is not authorized to employ private citizens at public

		SHERIFF'S DUTIES.	expense to take up, keep or feed any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat which may be found running at large outside the enclosure of the owner under Section 270.010, RSMo 1959. This is a duty specifically delegated to the sheriff and he is responsible for its performance.
68-61	Sept 13	LEWDNESS. COHABITATION. CRIMINAL LAW. EVIDENCE.	An unmarried man and woman, who are living together and holding themselves out as husband and wife can be prosecuted for open, gross lewdness or lascivious behavior under Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations.
71-61	Sept 26		Opinion letter to the Honorable J. L. Pickard
72-61	May 8	PUBLIC LIBRARIES. FIRST CLASS CITIES. COOPERATIVE SERVICES. DIRECTORS MAY CONTRACT FOR.	Directors of a public library of first class city are authorized by Section 182.301, RSMo 1959, to contract with governing body of any other public library in state for cooperative library services. Such contract is not subject to review, approval or disapproval by council of such first class city.
72-61	Oct 26	PUBLIC LIBRARIES. CONSTITUTIONAL CHARTER CITIES. ELIGIBILITY FOR STATE AID.	Constitutional charter cities levying and collecting library tax of one mill on dollar of assessed valuation imposed by city ordinance under authority of Secs. 137.020 and 94.400, RSMo 1959, sufficiently meets requirements of Sec. 181.060, RSMo 1959, as to amount, and if tax was duly assessed and levied for the year preceding that in which application for state aid grant was made the library of said city is eligible for a state aid grant under provisions of said Sec. 181.060.
74-61	July 26		Opinion letter to the Honorable James R. Reinhard
75-61	Feb 14	Hon. John M. Rice	WITHDRAWN
75-61	June 28	AIR CONDITIONING. MAGISTRATE COURTS. COURTS.	The county court cannot be compelled to pay for air conditioning in the courtroom, clerk's office, and judge's chamber of a Magistrate Court.
75-61	July 5	DENTAL BOARD. STATE OFFICERS.	Members of the Missouri Dental Board are state officers within the meaning of the constitutional prohibition against pay raises during current term. S. B. 216 imposes additional duties but manifests no intent that the pay raise effected by S.B. 154 should be compensation therefor.
75-61	Aug 21	COUNTY COLLECTORS. COUNTY COURT. SURETY BOND. COLLECTOR'S BOND.	When county consents to giving of surety bond by county collector, county must pay premiums on such bond coming due during entire term of collector.

75-61	Dec 8		Opinion letter to the Honorable John M. Rice
75-61	Dec 22	Hon. James T. Riley	WITHDRAWN
76-61	July 14	CEMETERIES, PUBLIC AND PRIVATE. TRUST FUNDS. ADMINISTRATION OF.	1. For keeping book on all receipts, disbursements and management of seven trust funds for maintenance of public and private cemeteries, under Sec. 214.180, RSMo 1959, County Clerk cannot be compensated from trust funds. 2. It is County's responsibility to pay for County Clerk's record book. 3. County Treasurer cannot be compensated for booking services on four of trust funds, services purely voluntary, no part of official duties. 4. Trustees' annual report, required by Sec. 214.150, RSMo 1959, shall be prepared by County Clerk and filed by trustees. County Clerk and County Court cannot be paid compensation for preparation and filing of report. 5. When requested, Prosecuting Attorney shall advise County Court on all legal questions arising in connection with preparation of trustees' annual report. Not Prosecuting Attorney's official duty to prepare report. He cannot be compensated for advice to Court in addition to statutory salary.
76-61	Sept 27	LICENSES. CHAUFFEUR'S LICENSES. MOTOR VEHICLES.	A resident of Missouri who operates a vehicle as a chauffeur on the highways of Missouri must obtain a Missouri chauffeur's license even though he may be properly licensed by another state.
76-61	Nov 6	CITIES. TOWNS AND VILLAGES. CONSOLIDATION. MUNICIPAL CORPORATIONS.	Every municipality to be consolidated under Section 72.150 RSMo 1959, must be adjoining and contiguous to every other municipality involved in the consolidation.
76-61	Dec 26	MERIT SYSTEM. MARSHAL. CITIES, TOWNS & VILLAGES. POLICE. POLICE DEPARTMENTS.	Adoption of merit system police plan by city of third class eliminates office of marshal; chief of police under merit plan, performs duties previously performed by marshal.
77-61	July 18		Opinion letter to the Honorable June R. Rose
79-61	Jan 20	EMPLOYMENT SECURITY.	Leroy F. Schantz, Director, authorized to requisition funds from federal Unemployment Trust Fund.
80-61	Jan 26	MAGISTRATES.	Incumbent magistrates salaries must be increased or decreased as of January 1, 1961, the effective date of 1960 census if application of statutory classification in effect at commencement of their terms so results.

80-61	Jan 27	GENERAL ASSEMBLY. PUBLIC OFFICERS. LEGISLATION. CONSTITUTIONAL LAW.	Pay increase of legislators effective 90 days after passage. Emergency clause invalid. Later of two conflicting constitutional provisions will prevail.
80-61	Mar 22	COMPTROLLER. CONSTITUTIONAL LAW. ATTORNEY GENERAL. CIRCUIT COURTS.	Obligations may be incurred and payments made out of the Milk Control Fund, pursuant to appropriation made in Section 30 of H.C.S.H.B. 574, pending the decision of the Supreme Court on the constitutionality of the Milk Control law, when the Attorney General holds said law to be constitutional and prosecutes an appeal from a circuit court judgment ruling the law invalid. Section 30 of H.C.S.H.B. is valid.
80-61	July 12	SOIL CONSERVATION DISTRICTS. OLD AGE AND SURVIVORS INSURANCE.	(1) Soil District on "instrumentality" within the meaning of the Old Age and Survivors Insurance Act; (2) services of soil district employees constitute "employment" within the meaning of Old Age and Survivors Insurance Act; (3) upon adoption and approval of a plan as required by Sec. 105.340 RSMo 1959 (OASI Act) employees of a soil district may be covered by OASI.
80-61	July 12	SPECIAL ROAD DISTRICTS. OFFICERS. TERM OF OFFICE. REMOVAL OF SECRETARY OF SPECIAL ROAD DISTRICT.	President, vice-president and secretary of special road districts organized under Section 233.170 RSMo 1959 et seq. serve at the pleasure of the board and may be removed from office only upon a majority vote of the board. A secretary, not a member of the board, elected by unanimous vote, holds office until removed by vote of a majority of the board.
81-61	Jan 26	SHERIFF. COUNTY COURT.	Section 57.445 V.A.M.S. 1960 Pocket Part, is interpreted as conferring discretion upon the county court of second, third and fourth class counties to determine whether sheriffs in such counties should be provided living quarters.
82-61	Dec 13		Opinion letter to Mr. V. H. Simon
83-61	Oct 11	COUNTY HOSPITALS. INCOME TAX WITHHOLDING. COUNTY COURTS.	Employer of County hospital employees is not authorized to deduct and retain a percentage of the state income tax withheld from employees wages.
83-61	Nov 17		Opinion letter to the Honorable Ralph E. Smith
84-61	June 13	VACANCY IN OFFICE. SHERIFFS. NOMINATIONS. SPECIAL ELECTIONS.	Resignation of sheriff should be addressed to County Court, and is effective upon its acceptance by such county court, but not before the time specified in the resignation. No steps may be taken to fill the vacancy prior to the effective date of the resignation. When special

		RESIGNATION.	election is required, notice thereof must be published at least once in some newspaper published in the county at least 20 days before the date of election. The county central committee of each political party may nominate the candidate of such party and independent candidates may also file for the office by obtaining sufficient signatures on nomination petitions.
84-61	Dec 26		Opinion letter to Honorable Edward W. Speiser
85-61	Jan 26	OFFICERS. CONSTITUTIONAL LAW. CENSUS.	Compensation of County Officers whose salaries are fixed in relation to population by statute in effect at date of their election must be increased or decreased in accordance with such statutory classification. Greater compensation is not an increase within the meaning of Article 7, Section 13 of the Constitution. 1960 census effective as of Jan 1, 61, for purpose of ascertaining county officers' compensation. As to incumbent officers paid on annual basis whose term commences on a date other than Jan 1, any change in compensation effective with next year of incumbency commencing after January 1, 1961.
85-61	May 17	FRANCHISE TAX. TAXATION. CORPORATIONS NOT ORGANIZED FOR PROFIT.	FMSM Corporation is not a corporation not organized for profit within the meaning of Sec. 14.010, par. 3, RSMo 1959, and is liable for the payment of the annual franchise tax.
86-61	Feb 16	PROSECUTING ATTORNEYS. BOGUS CHECKS. MAILING CHARGES. CRIMINAL LAW.	A prosecuting attorney sending notice to one pursuant to Section 561.470 VAMS on complaint of an insufficient fund check in violation of Section 561.460 VAMS, cannot charge to or demand of the complainant, the mailing charges thereof.
86-61	Mar 9	COUNTIES. COUNTY COURTS.	County Court of County of 3rd Class has no power or authority to rent parking space for use of county officials while attending to their official duties at county courthouse.
86-61	July 19	COUNTY COURT. COUNTY SANITARIAN.	There is no power in a county of the third class to create the office of county sanitarian to inspect and enforce rules regarding eating establishments and milk production facilities. If there is a duly appointed county health officer, he may employ personnel to assist him in gathering information upon which he can act whether he designates such person as county sanitarian or by some other name.
86-61	Oct 19	TAXATION. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS.	Real property and improvements constructed thereon which are owned by a municipality and leased to a private corporation may not be assessed against the municipality for property taxes but the private lessee's interest therein is subject to taxation.

		INDUSTRIAL DEVELOPMENT.	
88-61	Mar 22	CRIMINAL LAW. PRIOR CONVICTIONS. SELF-INCRIMINATION. TRIAL. CRIMINAL PROCEDURE. CONSTITUTION.	Under procedure established by Section 556.280, RSMo 1959, a defendant cannot be forced by the prosecution to testify as to his own prior convictions. To do so would be in violation of the immunity from self- incrimination granted to said defendant under Article I, Section 19, Missouri Constitution of 1945. However, said immunity may be waived by defendant voluntarily testifying to said prior convictions.
89-61	Nov 14	PROSECUTING ATTORNEYS. COUNTY COURTS. COUNTY HOSPITALS. CIRCUIT COURTS. MAGISTRATE COURTS. COSTS. COURT RULES. FILING FEES.	(1) A prosecuting attorney may not compromise and settle an action for the collection of county hospital accounts on his own initiative but must have express approval of any such compromise settlement from the county court (2) Circuit judges and judges of the magistrate court have authority to require the payment of court costs or a docket fee in advance at the time of filing suit and counties would have to comply with such rule and pay whatever costs or docket fee are required by the rule when filing suit in such court with the exception of that part assessed as the library fee in circuit courts and that part assessed as the six dollar filing fee in magistrate courts. (3) A prosecuting attorney has no authority to forward delinquent county hospital accounts to an out of state attorney for collection. Any such arrangements must be made by the county court.
90-61	Aug 7	PHARMACY BOARD. ADMINISTRATIVE AGENCIES. REGULATIONS.	Board of Pharmacy may not pass a regulation prohibiting the truthful advertising of prescription drugs in pharmacies.
90-61	Oct 27	COUNTY OFFICERS. TOWNSHIP OFFICERS. SOCIAL SECURITY.	Township collectors and their deputies, if any, are not subject to the provisions of House Bill 635 (71st General Assembly). Such collectors are not county officers within the meaning of the amendatory provisions of such bill, and therefore their deputies, if any, are not included in the extension of social security coverage provided for in such bill to employees of county officers compensated wholly by fees derived from sources other than county or state moneys.
90-61	Nov 28		Opinion letter to the Honorable Charles D. Trigg
90-61	Dec 7		Opinion letter to the Honorable Charles D. Trigg (Newton, Pulaski, and St. Charles counties)
90-61	Dec 7		Opinion letter to the Honorable Charles D. Trigg (Stoddard County)
90-61	Dec 7		Opinion letter to the Honorable Charles D. Trigg (Greene County)
90-61	Dec 7		Opinion letter to the Honorable Charles D. Trigg (Stoddard, Newton,

			Pulaski, and St. Charles counties)
90-61	Dec 7		Opinion letter to the Honorable Charles D. Trigg
90-61	Dec 12		Opinion letter to the Honorable Charles D. Trigg
90-61	Dec 22	PHARMACY BOARD. STATUTES.	Repeal of statute authorizing Pharmacy Board to give examination to and to license persons who met the standards set out in said statute left the Board without authority to give such an examination or issue licenses pursuant thereto three days after the repeal became effective.
92-61	July 6		Opinion letter to the Honorable A. Basey Vanlandingham
92-61	July 28	COUNTIES. COUNTY COURT.	County Court may lease out real property of county for short periods but may not enter into a lease for a term of 99 or 20 years.
92-61	Nov 14	RECORDER OF DEEDS. MARRIAGE LICENSES. MINORS.	Consent of a parent or guardian is required when a license is issued under a court order to a minor under fifteen years of age. No three day waiting period required by Section 451.040, RSMo 1959. May be waived by a circuit or probate court for good cause shown. No requirements in Section 451.050, RSMo 1959, regarding serological tests can be waived by any court except in case one of the applicants is pregnant or on the death bed. Section 451.090, RSMo 1959, does not authorize a court to order a license issued to an applicant over fifteen years of age.
94-61	Apr 13	SENATORIAL APPORTIONMENT COMMISSION. GENERAL ASSEMBLY. SENATE. REPRESENTATIVES.	1. Discretion of senatorial apportionment commission in establishing senatorial districts; 2. Board of Election Commissioners has sole authority to establish senatorial districts in City of St. Louis. 3. Senatorial apportionment commission has no authority in establishment of representative districts.
94-61	July 24		Opinion letter to the Honorable Robert P. Weatherford, Jr.
95-61	May 12	STATE EMPLOYEES. RETIREMENT. STATE RETIREMENT SYSTEM.	An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment on the condition that said retired employees voluntarily pay a reasonable sum certain into said retirement system as a condition precedent to receiving said increased benefits would be valid.
96-61	Jan 25	SCHOOLS. SCHOOL DISTRICTS. SCHOOL FUNDS.	A school district may acquire realty by purchase or by gift. Such acquisition should not bind or restrict the school board's discretion of determining educational policy. Contractual arrangements can only be for a reasonable period of time. School funds can not be used to improve public roads.
96-61	July 14		Opinion letter to Mr. Joseph M. Whealen

96-61	Nov 9	JUNIOR COLLEGE DISTRICTS. JUNIOR COLLEGES. SCHOOLS. SCHOOL DISTRICTS. STATE BOARD OF EDUCATION.	(1) Public school districts presently operating a junior college are not junior districts within the meaning of the junior college district act. (2) public school district which is now offering a junior college course may be organized into a junior college district or may be included as one of the districts for the organization of a junior college district in two or more contiguous public school districts. (3) state board of education has full discretionary-power to determine which petitions or proposals meet their standards for organization and which petitions or proposals will be submitted for a vote in those instances in which two or more petitions encompass a part of the same territory. (4) board of education of a public school district operating a junior college may discontinue or dissolve such junior college courses at their pleasure. A junior college district organized under the provisions of the junior college district act cannot force a discontinuance or dissolution of a junior college operated by a public school district so long as such junior college conforms to the scholastic standards established by the state board of education. The junior college district act is intended to facilitate the transfer of junior colleges operated by public school districts to a junior college district organized under the provisions of the junior college district act.
97-61	Jan 3	MAGISTRATES.	Salary of magistrates governed by Section 482.150.
97-61	Jan 25	PHARMACISTS. ECONOMIC POISONS. DEFINITION.	Pharmacists are not exempt from the application of the Missouri Economics Poisons Act. Definition of "economic poisons" is limited by its intended use; by the definition of the terms insects, fungi and weeds; and by the commissioner declaring them to be pests.
97-61	Feb 24	HIGHWAYS. MOTOR VEHICLES. SPEEDING, CARELESS AND IMPRUDENT DRIVING.	Drivers using completed, but as yet unopened portions of a highway may be prosecuted for speeding or careless and imprudent driving.
97-61	June 28	Hon. Robert P. C. Wilson, III	WITHDRAWN
97-61	July 21		Opinion letter to the Honorable Paul E. Williams
97-61	Nov 3	ASSESSMENTS. TANGIBLE PERSONAL PROPERTY. ASSESSOR'S DUTIES. FIRST CLASS COUNTIES.	1. Upon failure of taxpayer to file assessment list of all tangible taxable personal property within time and manner required by applicable statutes, Sec. 137.345, RSMo 1959, requires assessor of first class county to assess property which should have been listed at double value. He may rely solely upon next or last preceding list filed by taxpayer as to property and its value if it is best information obtainable. 2. For each subsequent year assessor determines a penalty

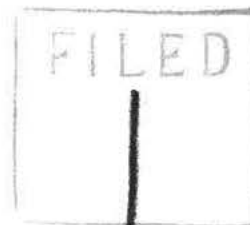
			is due he shall list property at double value shown on next or last preceding list of taxpayer, but is unauthorized to redouble value of property for each subsequent year he prepares a list. In no case may he assess property at more than double its value.
97-61	Nov 10	PROSECUTING ATTORNEYS. SALARY FOR PROSECUTING ATTORNEYS STENOGRAPHER. SALARIES AND FEES. FEES AND SALARIES.	Stenographic and clerical help for Prosecuting Attorneys of third and fourth class counties authorized by Senate Bill 324, 71st General Assembly not under provisions of Article VII Section 13, Mo. Constitution. County Court has power to approve or disapprove salaries of such help fixed by Prosecuting Attorney.
99-61	July 26		Opinion letter to the Honorable Larry M. Woods
99-61	Aug 2	CORPORATIONS. PROBATE.	Charitable, religious, or other corporations subject to Chapters 352 and 355, RSMo 1959, may not qualify as executors under Missouri's Probate Code, but may serve as testamentary trustees in carrying out trusts only for any of the legitimate purposes for which they are organized.
99-61	Dec 6	COUNTIES. COUNTY OFFICERS. MILEAGE. CIRCUIT CLERKS. MAGISTRATE JUDGES. MAGISTRATE COURTS. SHERIFFS. ASSESSORS. CORONERS. SALARIES. FEES.	Compensation and mileage increases authorize by 71st General Assembly.
100-61	Aug 11	SPECIAL ROAD DISTRICTS.	May issue warrants in anticipation of current year's income. May function with two commissioners pending appointment of third.
100-61	Aug 18	STATE HIGHWAY COMMISSION. TRAFFIC REGULATIONS. SCHOOLS. CONSTITUTIONAL LAW.	A municipality has the exclusive right to determine the time when and the place where a traffic signal shall operate within the limits of such municipality (except as may be otherwise provided by law and except to the extent such right has been limited by contract with the highway commission); the State Highway Commission has no power or authority to make any changes or alterations in the operation of such signal; and the State Highway Commission has no power to contact with school officials with respect to the operation of traffic signals.

100-61	Dec 1	Opinion letter to the Honorable Robert Young
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ADMINISTRATIVE LAW:
ADMINISTRATIVE AGENCIES:
ADMINISTRATIVE RULES:
PHARMACISTS:
PHARMACY:
PHARMACY BOARD:
REGULATIONS:

Pharmacy Board may not by regulation require drug stores to have a licensed pharmacist present at all times when they are open for business.

December 8, 1961



Honorable George Allen
Representative, Howard County
303A West Morrison Street
Fayette, Missouri

Dear Mr. Allen:

We are in receipt of your request for an opinion of this office which reads as follows:

"I would appreciate an opinion from your office answering the following questions:

"1. May a drug store operating in the State of Missouri keep open its other departments after the pharmacist has left the premises for the evening, although the pharmacist is on call at his home to fill any necessary prescriptions?

"2. Also, would the statutes be complied with by merely drawing a curtain over the drug section of a drug store during the time a pharmacist is not present on the premises and allowing the other departments of the drug store such as food, cosmetics, tobacco and sundry departments to remain open?

"I refer you to Sections 338.010 through 338.190 and Sections 338.210 through 338.310 of the Revised Statutes of Missouri. Under Section 338.240, subsection (4), it is provided that the manager of said pharmacy must be under

the supervision of a registered pharmacist, or an owner, or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physicians prescriptions in the event any such prescriptions are compounded or sold. Under those statutes it is also provided that the Missouri State Board of Pharmacy may make rules and regulations not inconsistent with the law.

"I understand that the Missouri State Board of Pharmacy has adopted as part of their rules and regulations that 'it shall be unlawful for any person or persons, firm, or business to operate or conduct a drug store, pharmacy, apothecary shop, chemist shop, etc. unless there shall be on duty at all times a pharmacist legally registered in the State of Missouri when such place is open for business.'

"The question then essentially is whether or not a drug store must have a pharmacist inside the place of business at all times that the store is open, so long as a pharmacist is employed and is in charge on a full time basis.

"Additional legislation may be needed in this area and I would appreciate your opinion in this matter."

There can be no doubt that the regulations of the Pharmacy Board quoted in your request (which is in fact Paragraph 2 of Vol. I of the rules and regulations of the Missouri Board of Pharmacy) requires that a registered pharmacist be on duty at all times when a drug store is open for business. The answer to the question posed in your request depends, therefore, on the validity of that regulation.

Sections 338.010 to 338.190, RSMo 1959, concern the regulation of the profession of pharmacy. Section 338.140, paragraph 1, reads as follows:

"1. The board of pharmacy shall have a common seal, and shall have power to adopt such rules and bylaws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under sections 338.010 to 338.190, and shall have power to employ an attorney to conduct prosecutions or to assist in the conduct of prosecutions under sections 338.010 to 338.190."

Sections 338.210 to 338.310, RSMo 1959, concern the regulation of pharmacies. A pharmacy is defined in Section 338.210 as follows:

"As used in sections 338.210 to 338.300 'pharmacy' shall mean any pharmacy, drug, chemical store, or apothecary shop, conducted for the purpose of compounding, and dispensing or retailing of any drug, medicine, chemical or poison when used in the compounding of a physician's prescription."

Section 338.280, RSMo 1959, authorizes the Missouri Board of Pharmacy to promulgate rules and regulations concerning the conduct of pharmacies. It reads as follows:

"1. The Missouri board of pharmacy may make such rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of sections 338.210 to 338.300.

"2. And such board is hereby authorized and empowered, after due notice and opportunity given for hearing, to revoke any permit or renewal thereof, when examination or inspection of a pharmacy shall disclose to such board that such pharmacy is not being operated or conducted according to such legal rules and regulations and the laws of Missouri with respect thereto.

"3. Rules or regulations made by the Missouri board of pharmacy under the provisions of sections 338.210 to 338.300, shall be adopted and become of force and effect, only after the

affirmative vote of a majority of the full membership of such board."

The regulation mentioned in your request purports to regulate pharmacies, in that it establishes a requirement with which pharmacies must comply in order to remain open for business. The authority of the Missouri Board of Pharmacy to promulgate such a regulation must therefore come, if at all, from the above quoted section 338.280, RSMo 1959. The validity of the regulation must be determined in light of the provisions of the general law governing administrative regulations and in the light of the statutory sections enacted by the legislature for the regulation of pharmacies.

The limitation on the power of administrative bodies entrusted with rule making powers are stated in Volume 73, CJS, Public Administrative Bodies, Section 94, page 414, as follows:

"* * *A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment."

A similar statement may be found in Volume 42, Am. Jur. Public Administrative Law, Section 53, page 358, as follows:

"* * *Since the power to make regulations is administrative in nature, legislation may not be

enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes, * * *

Section 338.240, RSMo 1959, states:

"Upon evidence satisfactory to the said Missouri board of pharmacy:

"(1) That the pharmacy for which a permit, or renewal thereof, is sought, will be conducted in full compliance with sections 338.210 to 338.300, with existing laws, and with the rules and regulations as established hereunder by said board;

"(2) That the equipment and facilities of such pharmacy are such that it can be operated in a manner not to endanger the public health or safety;

"(3) That such pharmacy is equipped with proper pharmaceutical and sanitary appliances and kept in a clean, sanitary and orderly manner;

"(4) That the management of said pharmacy is under the supervision of either a registered pharmacist, or an owner or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physician's prescriptions in the event any such prescriptions are compounded or sold;

"(5) That said pharmacy is operated in compliance with the rules and regulations legally prescribed with respect thereto by the Missouri board of pharmacy, a permit or renewal thereof shall be issued to such persons as the said board of pharmacy shall deem qualified to conduct such pharmacy."

In the above section the legislature has stated definite requirements regarding the supervision of pharmacies and drug stores by registered pharmacists. It has said that a drug store may be issued a permit to transact business if its management is under the supervision of either a registered pharmacist or of an owner or agent of the owner who has employed a pharmacist at his place of business for the purpose of compounding prescriptions "in the event any such prescriptions are compounded or sold . . ." However, the regulation fails to qualify its requirement that a pharmacist be present in the store at all times when it is open for business.

In view of the fact that most modern day drug stores engage not only in the business of filling prescriptions, but in such unrelated endeavors as the sale of hardware, clothing, and sporting goods, we must hold that the regulation exceeds the authority granted to the Board insofar as the regulation purports to require the presence of a pharmacist during the conduct of business other than that of compounding and selling prescriptions. A regulation of this nature would be an extension of the requirement imposed by the legislature, and therefore would be invalid insofar as it purports to enlarge the requirement of the statute.

CONCLUSION

Paragraph 2, Volume I, of the Rules and Regulations of the Board of Pharmacy, which purports to require the presence of a registered pharmacist at all times that a drug store is open for business, is invalid insofar as it enlarges the requirements of Section 338.240, RSMo 1959, that the management of a pharmacy be under the supervision of a registered pharmacist or an owner or employee of the owner who has a pharmacist employed for the purpose of compounding prescriptions in the event any prescriptions are compounded and sold. Inasmuch as the legislature has seen fit to require the presence of a pharmacist only at times when prescriptions are compounded or sold, the Board

Honorable George Allen -7-

may not make the additional requirement that a pharmacist will be present at all times. Therefore, a drug store may remain open for business other than the compounding or selling of prescriptions even though there be no pharmacist on duty at the time such other business is conducted.

This opinion which I hereby approve was prepared by my assistant, Ben Ely, Jr.

Yours truly,

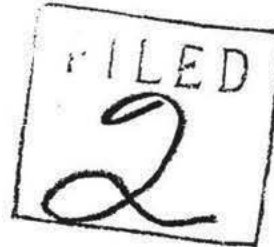
THOMAS F. EAGLETON
Attorney General

BE:ms

INCOMPATIBILITY OF OFFICES:
COUNTY HOSPITAL TRUSTEE:
CITY OFFICERS:
CITIES, TOWNS AND VILLAGES:
PUBLIC OFFICERS:
MAYORS:
CITY CLERKS:

Mayor or city clerk of 4th class
city or member of board of public
works of special charter city
may be member of Board of Trustees
of county hospital when hospital
is not located in any of such
cities.

March 2, 1961



Honorable A. J. Anderson
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Anderson:

This is in response to your letter dated January 24, 1961, requesting an official opinion of this office. Your letter reads as follows:

"Pursuant to your telephone conversation with the County Clerk, we are making this request for an Attorney General's Opinion.

Last fall Cass County, a third class county voted a \$400,000.00 bond issue for the construction of a county hospital. After the first of the year the county court appointed the five hospital trustees. Three of these trustees are office holders in three of the cities in Cass County, one is the mayor of Drexel, Missouri, a fourth class city; another the City Clerk of Belton, a fourth class city; and the third is a member of the Board of Public Works of Pleasant Hill, Missouri, which is a special charter city.

We could not see how the county office (if it is classed as an office) of hospital trustee would be incompatible with any one of three offices. The only statute that we know of relative to this is Section 73.500, V.A.M.S., 1949. This statute is in the chapter pertaining to first class cities so it is questionable as to whether or not it would apply to any

Honorable A. J. Anderson

other class of city, particularly when considered with Article 6, Section 15, of the Missouri Constitution.

"We would certainly appreciate it if you would expedite this and give us an opinion at your first convenience since it is imperative that we ascertain this at once, for you can readily see the confusion that may result if these gentlemen resign their respective city positions."

You further advised this office that the site of the new hospital has been established within the city limits of a city different from the cities in which these officers hold their offices.

Your precise inquiry is whether the office of trustee of Cass County Hospital is incompatible with the office of the mayor of a fourth class city, the city clerk of a fourth class city or a member of the Board of Public Works of a special charter city? You inferentially raise the collateral issue of whether the office of county hospital trustee is truly a "public office"? This preliminary issue is sufficiently answered in a prior opinion written by this office on June 28, 1954, and addressed to Mr. J. Patrick Wheeler, Prosecuting Attorney of Lewis County. This earlier opinion held that a trustee of a county health center is a public officer. In view of the fact that those statutes which set forth the powers and duties of trustees for county health centers are substantially identical to those relating to trustees of county hospitals, the conclusion reached in the prior opinion applies with equal force to your preliminary question.

There appears to be no constitutional or statutory prohibition forbidding a mayor, city clerk or member of the Board of Public Works from holding the office of trustee of the county hospital. However, Missouri courts recognize the common law doctrine prohibiting a public officer from holding two incompatible offices at the same time. State ex rel Walker v. Bus 135 Mo. 325, 36 S. W. 636, 33 L.R.A. 616; State ex rel Gragg v. Barrett, 352 Mo. 1076, 180 SW2d 730 and State ex rel McGaughey v. Grayston, 349 Mo. 700, 163 SW 2d 335. The doctrine is well imbedded in the common law and is of great antiquity, however a perusal of the cases gives little help in deciding what constitutes incompatibility in any specific factual situation. Each case turns on its particular circumstances.

Honorable A. J. Anderson

The classical definition of the doctrine is found in Bacon's Abridgment, Vol. 7, tit. Offices and Officers, K., page 313.

"Offices are said to be incompatible and inconsistent so as to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability; or when, their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty."

This same general doctrine appears today in a modern treatise on the subject. In 42 Am Jur. Public Officers, Section 70 page 936 it states:

" * * * Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. * * *"

The leading pronouncement in Missouri on this subject is State ex rel Walker v. Bus, supra. The Supreme Court in that case held that the offices of deputy sheriff and school director

Honorable A. J. Anderson

were not incompatible. In so holding the court said at 36 S.W. 1.c. 639:

* * *At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,-- some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N. Y. 295): 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other.* * *'

The difficulty or inability to draw a line which can reasonably separate those offices which are compatible from those which are not is well recognized by the courts. The consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. In the Grayston case, supra, the court held, on pages 339 and 340 of the reporter:

* * *The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other.* * *

The question then remains whether the duties of the trustee of the county hospital board are inconsistent, antagonistic, repugnant or conflicting with those duties of a mayor or city clerk of a fourth class city, or with those duties of a member of the Board of Public Works of a special charter city.

Those statutes setting forth the duties of the trustees of a county hospital are as follows:

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Section 205.190:

1. The trustees shall, within ten days after their appointment or election, qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of one of their number as chairman, one as secretary, and by the election of such other officers as they may deem necessary, but no bond shall be required of them.

2. The county treasurer of the county in which such hospital is located shall be treasurer of the board of trustees, and in counties which have no treasurer the county collector shall be the treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the control of the said board, as ordered by it, but shall receive no compensation from such board."

3. No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of all of the trustees present at a meeting of the board.

4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board.

Honorable A. J. Anderson

5. Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of sections 205.160 to 205.340 in establishing and maintaining a county public hospital.

6. Such board of hospital trustees shall hold meetings at least once each month, shall keep a complete record of all its proceedings; and three members of said board shall constitute a quorum for the transaction of business.

7. One of said trustees shall visit and examine said hospital at least twice each month and the board shall, during the first week in January of each year, file with the county court of said county a report of their proceedings with reference to such hospital and a statement of all receipts and expenditures during the year; and shall at such time certify the amount necessary to maintain and improve said hospital for the ensuing year.

Section 205.280 RSMo 1949 [permits the board to make certain rules and regulations.]

Section 205.330 RSMo, 1949, [gives the board the power to determine which patients shall be charity patients and to fix the price of compensation for patients able to assist themselves.]

The duties of the mayor of a fourth class city are enumerated in Section 79.110, RSMo 1949. This statute is as follows:

The mayor and board of alderman of each city governed by this chapter shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.

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The mayor also has the power of veto over proposed ordinances, Section 79.140; to administer oaths, Section 79.180; to sign commissions and appointments of city officers, approve official bonds and to sign orders, drafts and warrants, Section 79.190; enforce all laws and ordinances for the government of the city, Section 79.200; communicate to the board of aldermen measures to promote public health and welfare, Section 79.210; and to remit fines and forfeitures and grant reprieves and pardons for offenses arising under city ordinances, Section 79.220; all such sections being within RSMo, 1949.

The duties of the city clerk of a fourth class city are briefly outlined in Section 79.320 RSMo, 1949, as follows:

The Board of aldermen shall elect a clerk for such board, to be known as 'the city clerk', whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city.

The member of the Board of Public Works is governed by those powers and duties prescribed for such a board within the following applicable statutes:

Section 91.480 RSMo, 1949.

Whenever any such city mentioned in section 91.450 shall have by ordinance established a board of public works, as herein provided, such board so established in such city, town or village shall, during the existence of said board, have the power, and it shall be its duty, to take charge of and exercise control over any waterworks, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired

Honorable A. J. Anderson

by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants.

Section 91.490 RSMo 1949:

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

Section 91.530:

"The doing of all work and the furnishing of all supplies for the waterworks, electric power and light plant, or any other plant or work which may be under its supervision or control, shall be let out by the board of public works in the same manner as other public works are let out, except in cases where it is not practicable to do such work or furnish material by contract; and all contracts shall be submitted to the common council for approval. Said board may have charge of the purchase of all supplies needed by the city in its several departments, under such restrictions and regulations as may be provided by ordinance."

Section 91.540:

"The assessment and collection of rates for water, electric power, electric light, gas, or for the product or service of any other plant or works which any such city, town or village may own or operate, shall be under the control and supervision of the board of public works, when such board has been established as herein provided, subject to the ordinances of such city, town or village."

A studied comparison of those statutory powers and duties listed above reveals that no conflict arises when a mayor or city clerk of a fourth class city, or a member of the Board of Public Works of a special charter city, holds concurrently the office of trustee of the county hospital. Serving in one capacity is not

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antagonistic or inconsistent with holding the other office. The duties of one office are not repugnant or incompatible to the duties of the other.

CONCLUSION

It is the opinion of this office that no incompatibility arises when a mayor or city clerk of a fourth class city, or a member of the Board of Public Works of a special charter city, simultaneously holds the position as trustee for the county hospital, when said hospital is located within a city other than those cities in which the above city officers hold office. The duties of the city offices are not repugnant or inconsistent with the duties of the trustee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:cr

Eac.

PROBATE COURT:

INHERITANCE TAX:

While proceeding under heirship determination statute, the probate court should invoke its jurisdiction to assess inheritance tax on its own motion.

May 25, 1961



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri

Dear Mr. Anderson:

This is in response to your letter dated January 23, 1961, in which you request an official opinion from this office. Your letter is as follows:

"The Hon. David R. Hensley, Probate Judge of St. Louis County, has requested that I obtain an opinion relative to the interpretation of Sections of Revised Statutes of Missouri, 473.663, 145.020, 145.150 and 145.310.

"It has been the practice in the Probate Court of St. Louis County, in determination of heirship proceedings, not to enter any order relative to appointing an appraiser for Missouri Inheritance Taxes, or making an order finding no tax due, or assessing Missouri Inheritance Tax. While there is no express authority in Chapter 145 or the Probate Code for the Probate Court to make any order relative to inheritance tax in a determination of heirship proceeding, it is stated in Chapter 145 that if tax is due, it constitutes a lien on the interest transferred, so that if the Probate Court has the power to assess tax, it would not appear to be barred by any statute of limitations.

"The question then is whether Chapter 145, and in particular Secs. 145.020 and 145.150,

Honorable Norman H. Anderson

should be interpreted to authorize and direct the Probate Court to make orders relative to inheritance taxes in determination of heirship proceedings; and if so, whether the proper procedure is the one set out in Sec. 145.150, or the one set out in Sec. 145.310.

"I would request your office to render an opinion indicating whether or not the Probate Court should make orders relative to Missouri Inheritance Taxes in determination of heirship proceedings, and if so, which procedure should be followed."

You request the answer to two questions; (1) does the probate court have jurisdiction to determine the amount of inheritance tax owed and the persons liable therefor, when it makes an heirship determination, and (2) if this authority exists, should the probate court proceed according to Section 145.150 RSMo 1959, V.A.M.S. or 145.310, RSMo 1959, V.A.M.S.

An heirship determination is specifically provided for in Section 473.663, RSMo 1959, V.A.M.S. This section is as follows:

"1. Whenever a person has died leaving property or any interest therein and no administration has been commenced on his estate in this state, nor has any will been offered for probate in this state, within five years after his death, any person claiming an interest in such property as heir or through an heir may file a petition in the court which would be of proper venue for the administration of such decedent's estate to determine the heirs of the decedent and their respective interests as heirs in the estate.

"2. The petition shall state:

(1) The name, age, domicile and date of death of decedent;

(2) The names, ages and residence addresses of the heirs, so far as known or can with reasonable diligence be ascertained;

Honorable Norman H. Anderson

(3) The names and residence addresses of the persons claiming any interest in the property through an heir, so far as known or can with reasonable diligence be ascertained;

(4) A particular description of the property with respect to which the determination is sought;

(5) The net value of the estate.

"3. Upon the filing of the petition, the court shall fix the time for the hearing thereof, notice of which shall be given to:

(1) All persons known or believed to claim any interest in the property as heir or through an heir of the decedent;

(2) All persons who may at the date of filing of the petition be shown by the records of conveyances of the county in which any real property described in such petition is located to claim any interest therein through the heirs of the decedent; and,

(3) Any unknown heirs of the decedent.

"4. The notice shall be given by publication by publishing the same once each week for four consecutive weeks, the last insertion of publication to be at least seven days before the hearing. In addition, notice under subdivision (1) of subsection 2 of section 472.100, RSMo. or notice by registered mail shall be given to every such person whose address is known to the petitioner. Upon satisfactory proofs the court shall make a decree determining the heirs of the decedent and their respective interests as heirs in the property.

"5. A certified copy of the decree shall be recorded at the expense of the petitioner in each county in which any real property described therein is situated, and is conclusive evidence of the facts determined therein as against all parties to the proceedings."

Honorable Norman H. Anderson

This statute applies to those estates which have not had an administration commenced nor a will offered for probate within five years after the death of the decedent. Since five years has expired since the death of the decedent, no administration can be granted nor may any will be admitted into probate, Section 473.070 RSMo 1959, V.A.M.S. If no administration has taken place during the five years then all claims against the estate, except claims of the United States and tax claims of the State of Missouri and subdivisions thereof, are barred, Section 473.360, RSMo 1959, V.A.M.S.

The procedure for heirship determination found in Section 473.663, supra, is an innovation to Missouri probate law. Its introduction came as part of the new Probate Code. It replaced the customary method of determining heirship by the use of affidavits or recitals in deeds executed by the heirs themselves or by anyone acquainted with the family history of the decedent. The procedure has many similarities to the method used in formal administrations and since there is no administration there is some comparison with the heirship determination available for small estates under Sections 473.090 thru 473.107, RSMo 1959, V.A.M.S.

It is assumed in this opinion that the probate court acts within its judicial capacity, and that it has jurisdiction to so act, when it makes an heirship determination under Section 473.663. Jurisdiction is vested in the probate court to exercise its administrative authority to determine the amount of inheritance tax due when the court proceeds in a formal administration or under those statutes applicable to small estates, by reason of Section 145.150 RSMo 1959, V.A.M.S. If no proceedings are pending in this state in which the amount of said tax may be fixed then the jurisdiction of the probate court is governed by Section 145.310 RSMo 1959, V.A.M.S. This Section reads as follows:

"If any tax shall be due under the provisions of this chapter and no administration has been had in this state on the estate of decedent and no proceedings are pending in this state in which the amount of said tax may be fixed or the lien therefor enforced, any person interested in the property or estate may file an affidavit with the probate court of the county wherein the property or estate, or the greater part thereof, is situated, setting forth a description thereof and the clear market value thereof and the names of the persons, associations or corporations liable for the tax

thereon, and an appraiser shall be appointed and the tax fixed by said court as herein provided. However, the probate court of any county in which administration on any such estate should be granted, may on its own motion, appoint such an appraiser."

For reasons of emphasis it should be stated that when the probate court proceeds according to Section 473.663, supra, there is no administration of the decedents' estate, nor may an administration be granted. However, from the information received when an heirship determination is commenced the probate judge should, by his own motion, invoke his jurisdiction to assess inheritance tax under Section 145.310. By an application of Section 145.310, supra, the assessment of inheritance tax liability is a separate and distinct proceeding from an heirship determination. The court may proceed to fix the tax liability upon an affidavit filed by an interested person or the court "in which administration on any estate should be granted" may on its own motion appoint an appraiser to determine the tax due. 4 Missouri Practice, Probate Law and Practice, Section 1292, p. 485. The court fixes the tax liability "as herein provided", or more clearly, as provided in the inheritance tax law; namely, section 145.150, supra. The court's authority to proceed on its own motion is derived from an interpretation of the last sentence of Section 145.310. The phrase "in which administration on any such estate should be granted" could be clarified by the substitution of the words "have been" to read "should have been granted." This past tense interpretation is preferred to a possible future tense interpretation of substituting the word "later" to read "should later be granted." If there is administration in the future then the probate court has authority to appoint an appraiser on its own motion, Section 145.150, and this special authorization would be superfluous. However, the future tense cannot apply to the situation that arises after five years from decedent's death since there can be no administration in any event.

An heirship determination under Section 473.663 may have the practical result of conferring marketable title upon the heirs of the decedent insofar as questions of administration are concerned. However, the respective interests of the heirs will be subject to possible inheritance taxes, Basze, Proof of Succession to Land Under the New Missouri Probate Code, 25 Kansas City Law Review 67, loc. cit 78. Whatever information a probate judge may acquire when proceeding in an heirship determination, he should use this to assess the tax due. If no tax is due then this also should be stated. The inheritance tax liability is assessed under section 145.310, which places this administrative jurisdiction to make such an assessment,

Honorable Norman H. Anderson

on the courts own motion, in the probate court. This section supplements 145.150. They are not unrelated. When proceeding under section 145.310 the court fixes the tax liability according to section 145.150.

In Missouri the inheritance tax law is a tax imposed upon the right to receive property under a will or by the intestate laws of Missouri, In re Rosings' Estate, 337 Mo. 544, 85 SW 2d 495. The interest of each heir, with respect to decedents property, is saddled with a lien to secure the payment of the taxes due, In re Costello's Estate, 338 Mo. 673, 92 SW 2d 723. Since the probate court has no property in its control when it proceeds under Section 473.663 it cannot order the tax to be collected as assessed under Section 145.310. However, Section 145.280 RSMo 1959, V.A.M.S., would apply to this situation. This statute says:

"Whenever any tax shall be past due and delinquent under the provisions of this chapter, suit may be instituted in any court of competent jurisdiction by the prosecuting attorney of the county, or at the request of the director of revenue, by the attorney general, in the name of the state, to recover such tax and enforce the lien therefor and in any such suit all persons, associations or corporations interested in the estate from which such property is derived, including administrators, executors, guardians, curators, and trustees, may be made parties and service may be had on both residents and nonresidents in the same manner as provided by law in civil actions."

CONCLUSION

When the probate court makes an heirship determination under Section 473.663 RSMo 1959, V.A.M.S. it is exercising its judicial authority. If the court is to invoke its administrative jurisdiction to determine inheritance tax liability it may proceed by its own motion according to Section 145.310, RSMo 1959, V.A.M.S. The information gained while proceeding in an heirship determination should be used by the probate court to invoke its jurisdiction to assess inheritance taxes. The respective interests in decedent's property decreed in

Honorable Norman H. Anderson

the heirship determination will be subject to an inheritance tax lien if taxes are assessed by the probate court.

This opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

ECB:ac

HOSPITALS:
COUNTY HOSPITALS:

The board of trustees of a county hospital is authorized to purchase a tract of land for use as a hospital site with the sole consideration therefor being that the grantor be guaranteed lifetime hospitalization as may be required.

September 5, 1961



Honorable A. J. Anderson
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

We are in receipt of your request for an official opinion of this office, the relevant portion of which reads as follows:

"I would appreciate an official opinion from your office concerning the authority of the Board of Trustees of a County Hospital concerning the acquisition of a site for the location of a new county hospital.

"An individual has offered a tract of land to the Board for the location of the hospital, with the sole consideration therefor being hospitalization care as needed by her for her life in the county hospital, without charge. Is the Board of Trustees empowered to accept such a proposal, with consideration being given to Article 6, Section 26(a) of the Missouri Constitution of 1945, and of Section 205.270, VAMS, 1949? The donor could not be considered a pauper."

The statutory provisions relating to the establishment and maintenance of county hospitals are found in Sections 205.160 through 205.375, RSMo 1959. Section 205.190 reads in part as follows:

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be

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deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; . . ."

This section clearly empowers the board of hospital trustees to purchase a hospital site and grants them exclusive control over such purchase. Necessarily, this includes the power to negotiate a suitable price. In the present instance the obligation imposed upon the board to provide hospitalization as needed constitutes valuable consideration such as to make the proposed transaction a purchase, and it would therefore be within the powers granted the board by the above-quoted statute.

Your letter inquires of the effect of Section 26(a) of Article VI, Constitution of 1945, on the proposed agreement. That section is as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

The question arising from the above-quoted section is apparently whether the condition of lifetime care as needed by the grantor, contained in the proposal, constitutes an indebtedness within the meaning of the Constitution. In *State ex rel Hannibal v. Smith*, 74 SW 2d 367, a similar question was raised concerning the application of Section 12 of Article X of the Constitution of 1875, the predecessor of the above-quoted section and containing a substantially identical provision. In that case a city ordinance provided for the issuance of revenue bonds for the construction of a bridge. It further provided for the use of general revenue from taxation to pay for the maintenance of the bridge in the event that bridge revenues were insufficient for that purpose. The contention was made that this provision violated the constitutional inhibition against incurring an indebtedness in excess of the amount of the income in revenue for that year without the consent of the voters. Our Supreme Court said (l.c. 372):

"The question for us to determine is whether a contingent liability is a debt prohibited by article 10, §12, of our Constitution.

"In the case of Saleno v. City of Neosho, 127 Mo. 627, loc. cit. 639, 30 S.W. 190, 192, 27 L.R. A.769, 48 Am. St. Rep. 653, in an opinion by Burgess, J., we said: 'A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and, if not furnished, no payment could be required of it.'

"In the case of State ex rel. Smith v. City of Neosho, supra, Lamm, J., speaking for the court, quotes with approval Judge Burgess' definition of the word 'debt' as found in the Saleno Case.

"In 17 Corpus Juris, 1377, the author says: 'Every debt must be either solvendum in praesenti, or solvendum in futuro - must be certainly, and in all events, payable; whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a "debt". While the sum of money may be payable upon a contingency, yet in such case it becomes a debt only when the contingency has happened, the term "debt" being opposed to "liability" when used in the sense of an inchoate or contingent debt.'

"In the case of Bell v. City of Fayette, supra [28 SW2d 356], we held that a contingent liability was not a debt.

"We think the case of Hight v. City of Harrisonville, supra [41 SW2d 155], relied upon by the respondent, is distinguishable from the case at bar. In that case the city made an unconditional promise to pay a sum that was certain. A part of this sum was to be paid by taxation. The payment did not depend upon a contingency. That case is typical of the other cases relied upon by the respondent.

"We hold that these bonds do not violate section 12, art. 10, of our Constitution."

Honorable A. J. Anderson

This holding has been reaffirmed in numerous subsequent cases. See *City of Maryville v. Cushman*, 249 SW2d 347, 352; *Kansas City v. Fishman*, 241 SW 2d 377, 379; and *City of Springfield v. Monday*, 185 SW2d 788, 791.

It seems clear from the facts set out in your letter that any liability to be incurred by the county in the acceptance of the proposal would necessarily be contingent and therefore not an indebtedness within the constitutional meaning, under the rule set out above. You state that the offer is conditioned on a guarantee of hospital care "as needed". It may well be that the need will never arise. The possibility of future sickness certainly cannot be predicted with accuracy. Even if the grantor is seriously ill at the time the property is purchased, the possibility of recovery, at least to a point where hospitalization is no longer necessary, cannot be ruled out. For these reasons, it is the opinion of the office that a purchase of the sort here considered does not give rise to an indebtedness within the meaning of Section 26(a) of Article VI.

We have also considered the effect of Section 205.270, RSMo 1959, to which you refer. It is our opinion that this section has no application to a transaction of this nature.

CONCLUSION

The board of trustees of a county hospital is authorized to purchase a tract of land for use as a hospital site with the sole consideration therefore being that the grantor be guaranteed lifetime hospitalization as may be required.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JJM:ms

TRUSTS:
TAXATION:
INHERITANCE TAX:

Bequests to person for purpose of caring for
testator's cat held taxable under Missouri
Inheritance Tax Law.

October 18, 1961



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Anderson:

We are in receipt of your request for an official opinion
of this office which reads as follows:

"A question has arisen which, although on its
face may not seem to be of dire importance,
has caused some problems and will cause
problems in the future unless answers are
forthcoming.

"An appraisal has been made for Missouri
inheritance tax purposes of an estate of
a person who died testate, one of the
provisions in the will being that if the
decedent's cat was alive at the time of
the decedent's death, a certain fund was
to be placed in trust with the income and
any principal necessary to be used for the
care and maintenance of said cat. At the
cat's death, said fund, both principal and
interest, was to go to Harvard University.
The questions in the above matter are as
follows:

"1. Is a cat a 'person, institution, associa-
tion, or corporation' within the meaning of
Section 145.020, Missouri Revised Statutes 1959?

"2. If the cat is a 'person' under the above section, how is the life expectancy of said cat determined so as to determine the value for inheritance tax purposes of said cat's interest?

"3. If the cat is a 'person' under the meaning of Section 145.020, Missouri Revised Statutes, is the transfer one for 'charitable' purposes within the meaning of Section 145.090, Missouri Revised Statutes, or would the property be for a 'benevolent and charitable purpose' within the meaning of Section 145.100, subparagraph 1, Missouri Revised Statutes?

"As there is an estate pending at the present time, which estate is ready to be closed, we would appreciate answers to the above questions as rapidly as possible."

Article V of the will involved provides as follows:

"ARTICLE V. If my cat called 'Kitty' shall be living at the date of my death, I give and bequeath unto GEORGE S. HECKER, presently residing in St. Louis County, Missouri, the sum of Ten Thousand Dollars (\$10,000.00), to have and to hold the same in trust as Trustee for the uses and purposes and with the powers and duties as follows:

Section 1. The Trustee shall invest the funds of such trust estate in bonds issued by the United States of America, or deposit such funds in a Federal Savings and Loan Association, or both, in such proportions as he may deem advisable and shall use and apply so much of the net income therefrom and of the principal thereof as he shall in his absolute discretion deem necessary and proper for the care and maintenance of said cat during the remainder of her natural life.

Section 2. Upon the death of said cat, my Trustee shall pay over and deliver the then remaining principal and accumulated income, if any, of such trust estate unto the Trustees of Harvard University, the principal and income therefrom to be applied, at the absolute discretion of the Trustees of Harvard University, for scholarships to worthy and needy students of the Medical School of Harvard University in memory of Frederick Warren Hecker, son of Eugene A. Hecker, of the

Honorable Norman H. Anderson

Class of 1905, Harvard College, and Eugenie L. Hecker, of the Class of 1905, Wellesley College.

Section 3. Upon the death, inability or refusal to act or further act of George S. Hecker as Trustee hereunder, I hereby appoint my brother-in-law, John D. Lodwick, his successor Trustee; such successor Trustee shall have all of the powers, rights, obligations, duties, privileges and immunities herein granted to the original Trustee herein named. I direct that my Trustee hereunder shall serve without bond and without compensation."

In order to determine the taxability of this transfer, we must analyze it to see what type of transfer it is.

It cannot be a private trust. A private trust must have a beneficiary capable of possessing rights in the res of the trust, and capable of enforcing those rights against the trustee. Vol 1A Bogert, Trusts and Trustees, Section 161, page 84; Restatement, Trusts, 2nd, Section 112 (1959). The only possible beneficiary in this situation is the cat. An animal cannot possess rights in property. Gray, Nature and Sources of the Law (1921) Chapter 1, page 20, Chapter 2, page 43. Therefore, there is no beneficiary here who is capable of possessing and enforcing rights in the res, and there is no private trust.

The transfer does not establish a charitable trust. In order to have a charitable trust, a settlor must provide for an indefinite number of beneficiaries. Russell vs. Allen, (Mo. 1883) 107 U.S. 163, 27 L. Ed. 397, 2 Sup. Ct. 327. Here there is no such indefinite class nor undetermined number. The purported beneficiary is a single cat.

Transfers of this type have been called "honorary trusts". Restatement, Trusts, 2nd, Section 124; comment "C" (1959); In re Searight's Estate (1950), 87 Ohio Appeals 417, 95 N.E. 2d 779.

The Searight case involved a consideration of the taxability of these transfers. In it a testator had devised his dog to a legatee with instructions that the executor of his will deposit \$1,000.00 in a bank which was to be paid to the legatee periodically for him to use in the care of the dog.

The Ohio inheritance tax statutes, Section 5332 (1) of the General Code, similar in language to Section 145.020 RSMo 1959 read as follows:

Honorable Norman H. Anderson

"A tax is hereby levied upon the succession to any property passing, in trust or otherwise to or for the use of a person, institution or corporation, in the following cases:

'1. When the succession is by will or by the intestate laws of this state from a person who was a resident of this state at the time of his death.'

Section 5332 (4) of the General Code reads:

"4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property heretofore or hereafter made, such appointment when made shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by said donee by will * * *"

After considering the transfer in the light of the statutes the Ohio Court held that no inheritance tax could be levied and stated, at 87 Ohio Appeals 426, 95 N. E. 2d 784:

"This statute determines that a tax shall be levied upon succession to all property passing to a person, institution or corporation. Certainly, a dog is neither an institution nor a corporation. Can it be successfully contended that a dog is a person? A 'person' is defined as '3. A human being.' Webster's New International Dictionary, Second Edition.

"[5] We have hereinabove indicated that the bequest for the dog, Trixie, comes within the designation of an 'honorary trust,' and, as such, is proper in the instant case. A tax based on the amount expended for the care of the dog cannot lawfully be levied against the monies so expended, since it is not property passing for the use of a 'person, institution or corporation.'

"The executor herein had a power granted to him to use the funds for the support of the dog, which he proceeded to fulfill. Is it possible that such a power could be considered as a power of appointment within the terms of subsection 4 of Section 5332, General Code, and, hence, subject to taxation thereunder?

"[6] On this point, we need look for no other authority than that contained in 3 Restatement of the Law of Property (Future Interests), Section 318(2), which states the rule as follows:

'(2) The term power of appointment does not include a power of sale, a power of attorney, a power of revocation, a power to cause a gift of income to be augmented out of principal, a power to designate charities, a charitable trust, a discretionary trust, or an honorary trust.'

This opinion overlooks one basic issue. The transfer, although called an "honorary trust" is not an actual trust, either private or charitable. The trustee cannot be compelled to carry out the desires of the settlor; but has the power to carry out these desires if he so wishes. If he does not carry out the desires he holds as the trustee of a resulting trust for the settlor's estate. 2 Scott, Trusts, Sec. 124 (1956).

Since this is the case, the transfer here is neither a trust in the actual sense, nor an outright bequest to the so-called "trustee" as was held in *In re Renner's Estate* (1948) 358 Pa. 409, 57 A. 2d 836. It is a bequest to the "trustee" on the condition that he apply the income therefrom and the principal to the maintenance of the settlor's cat. The transfer is, therefore, one to a person within the provisions of Section 145.020 RSMo 1959.

The fact that the "trustee" does not come into a personal enjoyment of the property is of no effect. The "trustee" is lawfully entitled to possession of the amount devised, and he exercises control over it. Under such circumstances, he has possession and enjoyment of the bequest under the provisions of the last mentioned section. In *Re Costello's Estate* (1936) 338 Mo. 673, 92 S.W. 2d 723. The transfer is, therefore, subject to the Missouri Inheritance Tax.

Having decided this, we are met with another problem. What is the value of the bequest to the "trustee"? To answer this question we must look to the wording of the will itself. The determinative factor in this regard is that the will (Section 1, Article V) provides that the net income and the principal may be

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used in the discretion of the "trustee" for the care of the cat. The trustee has an unlimited power of encroachment for the purpose of caring for and maintaining the cat. The transfer should therefore be taxed for Missouri Inheritance Tax purposes as a bequest to the trustee at the full value of the principal involved, Ten Thousand Dollars (\$10,000.00).

If, as seems likely, the cat should die before the entire amount is used, the provisions of Section 145.230 RSMo 1959 may be invoked to provide a refund of the excess tax. This section provides that in the event of the abridgement, defeat or diminution of an estate, a return of the inheritance tax paid is to be made proportionate to the reduction in value of the estate actually received.

CONCLUSION

It is the opinion of this office that the transfer stated in your opinion request is taxable under the Missouri Inheritance Tax Law as a transfer to a person within the provisions of Section 145.020, RSMo 1959. It is further the opinion of this office that the tax should be assessed on the entire amount of the bequest.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EE:ms

SCHOOLS: Section 11(c), Article X of the 1945 Missouri
SCHOOL TAX LEVIES: Constitution, as amended, and Section 165.080,
CONSTITUTIONAL LAW: RSMo 1959, do not require that all proposed
TAXATION: tax rate increases for school purposes be
ELECTIONS: submitted to the voters in one single
proposition.

April 4, 1961



Honorable F. Neil Aschemeyer
Member, House of Representatives
House Post Office
Jefferson City, Missouri

Dear Mr. Aschemeyer:

This is in answer to your request for an Attorney General's opinion concerning House Bill No. 39 and Section 11 of Article X of the Missouri Constitution, which opinion request reads as follows:

"This letter will confirm our telephone conversation of this date. As previously mentioned I have introduced House Bill No. 39 which sets forth the form which I believe propositions for school levies should take. This form would require that the levies for separate funds be voted upon as a total levy rather than as separate levies. It is my view that this is the clear intent of Art. 10, Sec. 11 of the Missouri Constitution.

"It has been brought to my attention that in several instances separate funds have been voted upon separately. Sec. 165.080 RSMo 1959 is certainly subject to the construction that this may be done wherein the statute provides that the vote for any purpose shall be certified to the clerk or secretary of the school district. While in some instances such a practice would present no difficulty, in many others the result would be utter chaos. Let us suppose, for example, that three funds were voted upon separately which together would exceed \$3 but no two of which when considered together

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would exceed \$3. Assume further that upon a separate vote on these funds that two of the funds receive a simple majority while the third receives a two-thirds majority. It is my thought that in such a situation that the levy with respect to each of the three separate funds have all failed for the reason that taken together the three funds exceeded \$3 and each required a two-thirds majority. What other reasonable construction could be placed upon the language with respect to the 'total levy' as provided in Art. 10, Sec. 11 of the Constitution?

"However, if Sec. 165.080 is authority for voting upon these funds separately the aforementioned vote would be subject to three other possible interpretations. Since two of the funds taken together would not exceed \$3 and received a simple majority you could argue that these passed. You could also argue that the third fund which received a two-thirds majority should under any circumstances be considered as having passed. A third construction which is obviously strained would be that the two funds which taken together would not exceed \$3 and received a simple majority both passed, and that the fund which received a two-thirds majority passed because that was the fund which pushed the total over \$3."

We will first consider the constitutional provisions involved. Section 11(b) of Article X of the Constitution of Missouri, 1945, provides as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

For municipalities - one dollar on the hundred dollars assessed valuation;

For counties - thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;

For school districts formed of cities and towns - one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

For all other school districts - sixty-five cents on the hundred dollars assessed valuation."

Section 11(c) of Article X of the Constitution of Missouri, 1945, provides methods of increasing the tax rate within certain limits, and reads as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon

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shall vote therefor; provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

This office issued an opinion on March 8, 1951, to Honorable Hubert Wheeler, Commissioner of Education, a copy of which is enclosed for your information, in which it is stated that:

"In reading the above constitutional provision it appears that there are now two methods by which a school tax levy may be increased above the constitutional limit. First, by a two-thirds vote of the qualified voters voting in favor thereof any amount of tax may be levied for a school purpose for a period not to exceed four years, and, second, by a majority vote of the qualified voters voting in favor thereof a tax may be levied for school taxes not to exceed three times the constitutional limit and for a period not to exceed one year, and in school districts in cities of 75,000 inhabitants or over for a period of two years."

In your opinion request you state that it is your view that it is the clear intent of Section 11 of Article X of the Missouri Constitution to require that the levies for separate funds be voted on as a total levy rather than as separate levies. As I understand the question asked in your opinion request, it is whether the various proposed increases in the rate of taxation for separate purposes or funds must be voted upon in one single proposition or whether they can be submitted in more than one proposition for the approval or rejection by the voters.

The theory that one rate of taxation applies and one single proposition should be submitted runs into difficulty

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when considered in the light of all the requirements of Section 11(c) of Article X of the Constitution, quoted above, and particularly that part of said section which requires that the "rate period of levy and the purpose of the increase" are to be submitted to a vote (in considering this portion of the Constitution we read it as though there were a comma between the word "rate" and the word "period"). The difficulty lies in the fact that neither the rate, the period of levy, nor the purpose, is singular. The rate can be within three times the constitutional limit when approved by a majority vote, or it can be in excess of three times the constitutional limit when passed by a two-thirds majority vote. The period of levy can be one year with a majority vote (two years in districts in cities of 75,000 inhabitants or over), or it can be up to four years with a two-thirds majority vote. The purpose can be any one, or a combination of several, or all of the funds specified in Section 165.110, RSMo 1959. Actually, there are hundreds of variations in the rates, terms of years and purposes which could be submitted to the voters, and yet all of the rates and propositions validly passed by the voters are combined to make the "total levy." Thus, the one rate theory of Section 11(b) is carried over into Section 11(c) in the words "total levy," and the one rate of taxation is actually the total levy, and the total levy is a combination of all the rates which have been legally established and certified to the county clerk, whether there is one single rate for one year or a combination of several excess rates for various terms of years and passed by a majority and a two-thirds majority vote over the constitutional limits. Section 11(c) provides for the possibility of several different rates for various terms of years. All these rates are included in the total levy. In Section 11(c), the Constitution is silent as to the form of proposal, the singleness or multiplicity of proposals, and the methods of submission to the voters. It neither prohibits nor requires the submission of a proposal as a total levy or as separate individual levies. Prior to the amendment of Section 11(c) in 1950, there were at least two methods of submitting a proposition for a school tax increase to the voters. In State ex rel. Thorp v. Phipps, 148 Mo. 31, the information given to the voters voting on a tax levy for more than one school purpose was as follows, l.c. 34:

" * * * to vote on a proposition to levy
100 cents on the \$100 assessed valuation
of the district for school purposes; 85

Honorable F. Neill Aschemeyer

cents of said 100 cents to be applied for
teachers' fund and 15 cents of said 100
cents to be applied for incidental fund.
* * *"

Under this case, one proposal was satisfactory.

In Peter v. Kaufmann, 38 SW2d 1062, there were two separate
propositions submitted to the voters, and the court said, *Id.*
1065:

"There is nothing to suggest that any
voter was in any way deceived or misled
by the action taken by the school board
or by the notices posted or the ballots
used at the election. The voters under-
stood the propositions submitted and the
will of the voters was ascertained.
Jacobs v. Cauthorn, 293 Mo. 154, 238 S.W.
443. The result of the election was as
follows:

'For 100 cents building levy	149 votes
'Against 100 cents building levy ...	44 votes
'For 35 cents excess levy	171 votes
'Against 35 cents excess levy	20 votes.'

"We therefore overruled plaintiff's contentions
as to these matters."

Under this case, two separate proposals were satisfactory.

Section 11(c) of Article X of the Constitution of Missouri,
1945, requires the "rate period of levy and the purpose of the
increase" to be submitted to a vote, and it provides for more
than one purpose, more than one term of years, and more than one
excess rate over the constitutional limit. Thus, if the rate,
purpose, and term of years conforming to the facts of a situa-
tion can all be included in one proposal for submission to the
voters, such a proposition is satisfactory. This is the holding
of the previous opinion of this office of March 8, 1951, referred
to above. But we must go beyond the holding of the previous
opinion and say that if various rates for several different pur-
poses and for different terms of years, or more than one different
excess rate over the constitutional limit and requiring both a
majority vote and a two-thirds majority vote for approval, are
decided to be submitted to the voters under a given fact situation,
more than one proposition would be satisfactory.

Honorable F. Neil Aschemeyer

We thus place the question of the form of proposal of an excess rate under Section 11(c) of Article X of the Missouri Constitution, where it really belongs, i.e., it must conform to the facts of each individual situation and reasonably present the various proposals to the voters so that they can exercise their right of choice of approval or rejection on each different proposal. The validity of each proposal must stand or fall on the test of whether or not it conforms to the facts of each situation and whether that fact situation is within the constitutional limit and receives the necessary majority vote or two-thirds majority vote of the people. In any event, the voters are entitled to make their choice of approving or rejecting an excess rate which is required to be submitted to them by Section 11(c) of Article X of the Missouri Constitution. In approving or rejecting each separate proposed excess rate they are thereby approving or rejecting the total levy, which total levy is a combination of all the various rates, purposes and terms of years which are approved by the necessary majority of the voters.

It is thus concluded that Section 11 of Article X of the Constitution of Missouri, 1945, does not require that all proposed tax rates for school purposes be submitted to the voters in one single proposition.

Section 165.080, RSMo 1959, as it is now in effect, was passed to implement the provisions of Section 11 of Article X of the Missouri Constitution, as amended, and this section provides as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the school board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying

Honorable F. Neil Aschemeyer

separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by section 165.200; and if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

This section as it now is recognizes the one rate of taxation in the "total levy" and in its provision "to increase the annual rate of taxation." This section also recognizes the possibility of different levies and separate propositions in submitting the total levy to the voters, at least in certain instances. In the language of that section, it requires that the school board shall submit any proposed tax increase to the voters, "specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective," and said section further provides, "if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose." Under this language the board must specify separately the rate, each purpose and the number of years for each proposed excess rate to be submitted to the voters. The crux of the question asked in your

Honorable F. Neil Aschemeyer

letter is whether there should be one single proposition or whether more than one proposal is permitted. Section 165.080, RSMo 1959, does not specifically require one or a multiplicity of proposals. It is silent as to the form of the proposal. The reasoning in favor of both a single proposition and multiple propositions, as applied to Section 11(c) of Article X of the Constitution and above set forth, applies with equal vigor to this section of the statutes. Section 165.080 is even more insistent in its language in favor of the submission of more than one proposition when the facts of the situation call for it, in the language of the section which provides that the school board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, "specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective," and the language which further provides that if the voters "favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose," shall be certified to the county court. Using the reasoning as applied to the Constitution and the stronger language of the statute, we arrive at the same conclusion respecting Section 165.080, RSMo 1959, as we did with respect to Section 11 of Article X of the Constitution, namely, that this section does not require that all proposed tax rate increases for school purposes be submitted to the voters in one single proposition. The facts of each situation will determine whether one or more than one proposition will suffice.

CONCLUSION

It is the opinion of this office that Section 11(c) of Article X of the Constitution of Missouri, 1945, and Section 165.080, RSMo 1959, do not require that all proposed tax rate increases for school purposes be submitted to the voters in one single proposition.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW:ml
Enc.

TAX SALES
REDEMPTION:

Since the county collector has no duty or authority to collect delinquent city taxes in a city of the third class, he is under no obligation or statutory duty to check to see whether city taxes accruing subsequent to the sale of realty by the county collector for delinquent county and state taxes have been paid by the certificate holder before permitting the owner to redeem the property

May 22, 1961



Honorable Roderic R. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Ashby:

Your request addressed to the Honorable John M. Dalton for an official opinion reads as follows:

"I seek an official opinion as to the following question: Whether it is the duty of the County Collector to check and see whether city taxes which have accrued subsequent to the tax sale have been paid by the certificate holder before permitting the owner to redeem the property?"

In your letter of February 16, 1961, you stated that the request for an opinion was made after you were contacted by the city clerk when the owner of property located in the City of Charleston, a city of the third class, attempted to redeem property sold for delinquent state and county taxes.

The manner of redemption of realty sold for taxes, and the duty of the county collector in regard to redemption, is set forth in Section 140.340, RSMo 1959, which reads:

"1. The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner; By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the cost of the sale together with interest at the rate specified in such certificate, not to exceed ten per cent annually, with all subsequent taxes which have been paid thereon by the

purchaser, his heirs or assigns, with interest at the rate of eight per cent per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.

"2. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last post office address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption.

"3. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns of any further interest or penalty.

"4. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."
(Emphasis ours)

From the above section it is clear that it is the duty of the County Collector, in a situation which comes within the compass of Section 140.340, supra, to mail to the purchaser of land sold for taxes, notice of the deposit for redemption set forth in numbered paragraph 1 of the above section. With reference to the amount required to be paid for redemption, numbered paragraph 1 states that there shall be included in the amount deposited "all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of 8% per annum."

It is clear that to resolve this issue we must determine the meaning, that is the inclusiveness, of the term "all subsequent taxes", as it is used in paragraph 1 of Section 140.340, supra. This section is a part of the comprehensive Jones-Munger Act of 1933.

Section 140.440, RSMo 1959, relates to the taxes that a certificate holder must pay before he is entitled to apply for a deed and reads in part as follows:

"Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein

pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, * * * (Emphasis ours)

The underlined portion of the above quoted statute clearly spells out that before the petitioner is entitled to a deed he must pay "all" taxes that have accrued since the certificate was issued and all prior taxes the lien for which was not foreclosed by the sale.

Section 140.440, RSMo 1959, must be read in conjunction with Section 140.420, RSMo 1959, which provides that the collector's deed "shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold." Inasmuch as the purchaser is not entitled to a deed absent payment of "all" unpaid taxes, it is obvious that the word "all" can mean only such taxes (including those assessed subsequent to the taxes for which the sale was made) as the collector is authorized to accept, else the foregoing provision of Section 140.420 would be meaningless. Such was the effect of the decision of the Supreme Court in State v. Baumann, 160 S.W. 2d 697. In that case the court held as follows:

"Section 11109, Revised Statutes 1939, Mo. St. Ann §§ 9937, p. 7982, declares a lien on real estate in favor of the State for general taxes. Section 11206 declares a lien in favor of the State for city, town and school taxes, 'the same as for state and county taxes'. By Section 11207 the lien of the State for city taxes was assigned to the cities. See history of these and other statutes in State ex. rel. v. Nolte, 345 Mo. 1103, 138 S.W. 2d 1016. The wording of these sections indicates that the lien for general city, town and school taxes is on an equality with the lien for general state and county taxes and that is the general rule. 26 R.C. L. page 404, sec 361. But under existing Missouri statutes we do not believe we are authorized to hold that the lien for general taxes takes precedence in the reverse order of accrual.

Outside the city of St. Louis, under the Jones-Munger Act, sales for state and county taxes are made by the county collector and sales for city taxes are made by the city collector under a different advertisement. One purpose of Sections 11149 and 11152 evidently

is to prevent a sale by the county collector from destroying the lien for city taxes and to prevent a sale by the city collector from destroying the lien for state and county taxes, both liens being on an equality. Section 11152 requires the purchaser, before receiving a deed, to pay prior unpaid taxes, but, as the county collector is not authorized to receive city taxes and the city collector is not authorized to receive state and county taxes, Section 11149 makes the deed subject to such unpaid prior taxes as the collector is not authorized to collect. That is, the deed of the county collector is subject to prior unpaid city taxes and the deed of the city collector is subject to prior unpaid state and county taxes. The city of St. Louis, being both a city and a county, the same officer would there collect all the prior general taxes, state, county and city, before delivering the deed." (Emphasis ours)

Section 11152 referred to in the Baumann case, supra, is present Section 140.440 and Section 11149 is present section 140.420 RSMo 1959. The Baumann case makes it clear that sales for city taxes are made by the city collector in a proceeding wholly unrelated to any sale by the county collector. And the case of *Gilmore v. Hibbs*, 152 S.W. 2d 26, expressly held that a city of the third class may proceed under the Jones-Munger Law to sell real estate for the collection of delinquent city taxes, said sale being conducted by the city collector.

In *Cabiness v. Bayne*, 257 S. W. 2d 626, 631, the Supreme Court of Missouri in referring to the opinion in the case of *State ex rel McGhee v. Baumann*, 160 S. W. 2d 697 stated:

"It also noted that Sec. 11109, R. S. 1939, Sec. 140.020, RSMo 1949, V. A. M. S., declares a lien on real estate in favor of the State for delinquent general taxes, and that Sec. 11206, R. S. 1939, Sec 140.690 RSMo 1949, V. A. M. S., declares a lien on real estate in favor of the State for city, town and school taxes 'the same as for state and county taxes'. Also, by Sec. 11207, R. S. 1939, Sec 140.700 RSMo 1949, V.A. M. S., the lien of the State under Sec. 11206, supra, was assigned to the cities, thus indicating the lien for general city, town and school taxes was put on an equality with the lien for general state and county taxes, which the decision said was the general rule. * * *"

It is also to be noted that Section 140.440, RSMo contains a further provision to the effect that a purchaser that shall suffer "a" subsequent tax to become delinquent and "a" subsequent certificate

Honorable Roderic R. Ashby

of purchase to issue on the same property forfeits his right to priority to the subsequent purchaser. The clear implication of this statute is that the subsequent tax therein referred to is a tax of the same kind as that for which the property was sold to the first purchaser.

Another statutory provision relating to subsequent taxes is Section 140.320, RSMo 1959, which provides that if a purchaser takes possession of the land within the redemption period he must pay "the" taxes subsequently assessed during the period of occupancy and within the redemption period, and that upon failure to do so shall forfeit all rights as to such land acquired by his certificate of purchase. Here, too, the clear implication is that the reference to "the" taxes subsequently assessed means those taxes of the same kind as those for which the property was sold to the holder of the certificate of purchase.

It is true that none of the cases cited hereinabove define the phrase "all subsequent taxes". However, these cases do clearly hold that the sale of real estate for delinquent state and county taxes and for delinquent city taxes are two separate and distinct transactions, neither one of which forecloses action on the other. A study of these cases in the light of the above cited statutes leads to the conclusion that the county collector has nothing to do with delinquent city taxes in a city of the third class, and that the term "all subsequent taxes" as used in Section 140.340 has reference only to those taxes which the collector is authorized to collect. In the light of the Jones Munger Law, read as a whole, the term "subsequent" taxes can mean only such taxes as those which would permit the particular collector to sell the property as delinquent.

CONCLUSION

Therefore, it would appear that since the county collector has no duty or authority to collect delinquent city taxes in a city of the third class, he is under no obligation or statutory duty to check to see whether city taxes accruing subsequent to the sale of realty by the county collector for delinquent county and state taxes have been paid by the certificate holder before permitting the owner to redeem the property.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

(Opinion request No. 375 answered by this letter.)

December 8, 1961



Honorable Roderic R. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Ashby:

This is in response to your letter dated October 11, 1961, requesting an official opinion of this office. In your letter you state that Mississippi County has recently adopted Chapter 114, RSMo., as amended, requiring the registration of qualified voters for the county. You stated that the County Clerk of Mississippi County wanted to know if the county registration law applies to the special gas tax election set for March 6, 1962.

In a recent telephone conversation you had with this office, you stated that Mississippi County had adopted the county registration law prior to September 15, 1961. Therefore, there is no question as to whether the registration law is presently in effect in your county.

The only question is whether this law applies to the specific election to be held on March 6, 1962. The answer to this latter question, I believe, is to be found in Section 114.240, RSMo. Cum. Sup. 1961. In the 1959 revised statutes, the above section appears as follows:

"Nothing contained in this chapter
is construed so as to include elections

Honorable Roderic R. Ashby

-2-

other than primary and general elections."

The 71st General Assembly re-enacted this section (H. B. 649) to read as follows:

"This chapter shall not be construed to include elections other than state and county general, special and primary elections and municipal elections of all kinds in cities having more than four hundred thousand inhabitants." (Emphasis added.)

In light of the specific provision declaring Chapter 114 to apply to special elections the answer to your question is in the affirmative.

Yours truly,

THOMAS F. EAGLETON
Attorney General

EGB:ccc

October 31, 1961



Honorable Lee Aaron Bachler
State Senator
28th District
Anderson, Missouri

Dear Senator Bachler:

This refers to your letter of October 20, 1961, which reads as follows:

"I would appreciate an opinion from your office as to whether the encumbant Treasurer in a Class 4 county is entitled, during his current term of office, to the salary applicable to his county as provided for under Section 54.270 of the Amended Laws of the Revised Statutes of the State of Missouri and if so, the date that said salary would become effective."

We understand your inquiry to be whether county treasurers in Class 4 counties, without township organization, can receive during their present terms of office the increase in salaries provided by an amendment to Section 54.270, R.S.Mo. 1959, enacted in 1961.

Prior to the recent amendment, Section 54.270 read as follows:

"The county treasurers in counties of the fourth class of this state shall receive for their services annually the following sums: In counties having ten thousand inhabitants or less, the sum of one thousand eight hundred dollars;

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in counties having more than ten thousand inhabitants and not more than twelve thousand five hundred, the sum of two thousand one hundred dollars; in counties having more than twelve thousand five hundred inhabitants and not more than fifteen thousand, the sum of two thousand four hundred dollars, and in counties having more than fifteen thousand inhabitants the sum of two thousand eight hundred dollars. The salaries are in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind."

It perhaps should be noted that Section 54.270 had been amended in 1959, after the present county treasurers took office. However, that was merely a revision amendment which changed the salaries stated in Section 54.270 to include compensation previously provided by Section 54.273, which was then repealed. Hence, the salaries set forth in Section 54.270 as quoted above were in effect (pursuant to Sections 54.270 and 54.273) when the present county treasurers took office.

The recent amendment to Section 54.270 increased the salaries specified by that section by \$500.00 in each instance. This increase was not granted as additional compensation for the performance of new duties placed upon the county treasurers. In such circumstances, it is the settled law of this state that the increase cannot be received during the present term of office in view of Article VII, Section 13, Constitution of Missouri, which reads, in part, as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; * * *."

While you do not mention it in your letter, it occurs to us, because of another inquiry made of us informally, that your inquiry may have been prompted by the thought that the answer as to McDonald County might be affected in some way by the fact that, due to a decrease in population, the county treasurer of that county is now receiving less pay than at the beginning of his term.

Prior to the 1960 census, McDonald County was in the 12,501 to 15,000 population bracket and, pursuant to

Honorable Lee Aaron Bachler October 31, 1961

Section 54.270, the county treasurer received \$2400.00. Under the 1960 census, which became effective for this purpose on January 1, 1961, McDonald County dropped to the 10,001 to 12,500 population bracket and the county treasurer's salary under Section 54.270 became \$2100.00.

It does not appear to us that these facts could have any bearing upon the county treasurer's entitlement to part or all of the \$500.00 increase provided by the 1961 amendment to Section 54.270. A change resulting from a county moving from one population and salary bracket to another during the term of office is not regarded as an increase or decrease of compensation during the term of office for the purpose of the pertinent constitutional provision. At \$2100.00, the county treasurer of McDonald County is receiving the salary which was fixed at the beginning of his term for counties of the classification into which McDonald County now falls, and such compensation cannot be increased during his term of office. In this connection, we are enclosing copies of opinions furnished to F. Hiram McLaughlin on July 11, 1940, and to Mrs. G. B. Stewart on January 26, 1961, which contain extensive quotations from Missouri court decisions pertinent to this matter.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB:BJ

TEACHERS:
TEACHERS' CERTIFICATES:
SCHOOLS:
COUNTY SUPERINTENDENT OF SCHOOLS:

Teachers' certificates are valid when issued and (except for county third grade certificates) the local County Superintendent of Schools does not have authority to require such certificates to be registered or recorded with him, and the county superintendent of schools does not have the power to pass on the moral character and requirements, other than scholastic, of the teacher, (except teachers holding county third grade certificates).

July 28, 1961

Honorable Paul L. Bell
Prosecuting Attorney
Crawford County
Steelville, Missouri



Dear Mr. Bell:

This is in answer to your request for an opinion dated April 13, 1961, which request reads as follows:

"Mr. Sam Bayless, the County Superintendent of Schools of Crawford County, Missouri has requested that I get your opinion as to whether or not a school teachers certificate is valid before it has been registered with the County Superintendent and he has passed on the moral character and requirements other than scholastic of the teacher as provided in Missouri Revised Statutes Section 168.070."

Implicit in your question concerning the validity of the certificate are the underlying and controlling questions of whether the certificate must be "registered" with the local county superintendent of schools and whether the county superintendent of schools must pass on the moral character and requirements, other than scholastic, of all teachers within his county. We are unable to find any statute which expressly requires a teacher to register or record his teacher's certificate with the county superintendent of schools of the county within which the teacher seeks to teach. Section 168.070 RSMo 1959, referred to in your opinion request, reads as follows:

"The county superintendent of public schools shall pass on the moral character and requirements, other than scholastic, of all persons who by virtue of teaching in his county must register their certificates with his office, and he shall preserve

Honorable Paul L. Bell

such certificate registration record by years and deliver same to his successor in office." (Emphasis added)

In State ex rel Gorman v. Offutt, 223 Mo. App. 1172, 26 S.W. 2d 830, 1.c. 831, it is said:

"In the interpretation of a statute we are bound to consider all the provisions thereof and to so rule, if possible, that no part is destroyed or made meaningless by the construction of other parts (Rutter v. Carothers, 223 Mo. loc. cit. 643, 122 S.W. 1056), and we have no right, by construction, to substitute any ideas concerning legislative intent contrary to those unmistakably expressed in legislative words. Clark v. Railroad Co., 219 Mo. loc. cit. 534, 118 S.W. 40, 44."

In determining the meaning of Section 168.070 RSMo 1959, we examine other statutes dealing with teacher's certificates.

Section 168.030 RSMo 1959, gives the State Board of Education sole authority to grant certificates, except for a "life teaching certificate" issued by state colleges which is registered in the State Department of Education and except that county superintendents of schools have authority to grant "third grade county certificates".

Section 160.090, paragraph (7) RSMo 1959, provides that the State Board of Education shall grant certificates of qualification and licenses to teach in any of the public schools of the state, establish requirements therefor, formulate regulations governing the issuance thereof, and cause the same to be revoked for incompetency, cruelty, immorality, drunkenness, or neglect of duty. Section 168.040 RSMo 1959, requires the county superintendent of schools to conduct examinations, but the questions are prepared by the State Department of Education except for a special third grade certificate and the questions are graded by the State Department of Education except for applicants for third grade certificates requesting that they be graded by the county superintendent. Section 168.060 RSMo 1959, provides that the manner and method for the renewal of certificates be prescribed by the State Department of Education. Section 168.090 RSMo 1959, provides that the office, institution or official having authority to issue certificates, shall in like manner have authority to revoke said certificates upon satisfactory proof of incompetency, immorality, neglect of duty or the annulling of written contracts. The revocation can be made only after

Honorable Paul L. Bell

due notice and a hearing. The general tenor of all these statutes has been to place the authority and control of all teacher's certificates in the State Department of Education, except third grade county certificates and life teaching certificates. The county superintendent of schools has authority and control only over third grade county certificates which he issues. Section 168.040 RSMo 1959, requires a person to complete four years of high school and to present evidence of good moral character before receiving or holding a teacher's certificate.

The clear implication of this statute is that the moral character of the applicant must be passed on before the certificate is granted or renewed. Once a certificate has been issued or renewed the question of moral qualification has already been passed upon and the certificate is necessarily valid when issued, subject only to revocation as provided by Section 168.090 RSMo 1959. Thus, holders of certificates granted by the State Board of Education and holders of life teaching certificates may, upon issuance of such certificates, teach in public schools in any county of the state without regard to whether such certificate has been registered with the office of the county superintendent of public schools in the county in which the teacher seeks to teach and without regard to whether the county superintendent of public schools of the county in which the teacher seeks to teach has passed upon the moral character and requirements, other than scholastic, of such teacher. We therefore conclude that Section 168.070 RSMo 1959 authorizes the county superintendent of schools to pass upon the moral qualifications of a teacher only with respect to the granting or revocation of a third grade county certificate issued by such county superintendent of schools. The local county superintendent of schools has no power or authority to require the holder of a life teaching certificate or the holder of a certificate issued by the State Board of Education to register or record such certificate with his office.

CONCLUSION

All life teaching certificates and all certificates issued by the State Board of Education are valid when issued and the local County Superintendent of Schools has no authority to require the holder thereof to register such certificates with him and the local county superintendent of schools has no power to pass on the moral character and requirements, other than scholastic, of the holders of such certificates.

Honorable Paul L. Bell

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

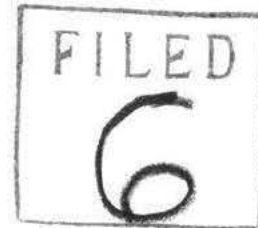
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DEPOSITIONS:
NONRESIDENT PLAINTIFF:
EVIDENCE:
MAGISTRATE COURT:

If a plaintiff in a civil action in magistrate court is a nonresident of the State of Missouri and not present at trial, his deposition may be used to prove his case, provided he has complied with the statutory procedural matters relating to the taking of said deposition, as well as to its introduction during trial.

October 9, 1961

Honorable Dwight Beals
Representative 10th District
Jackson County
603 Commerce Building
Kansas City 6, Missouri



Dear Representative Beals:

This is in reply to your opinion request of July 26, 1961, wherein you advise that the magistrate judges in Jackson County will not let a nonresident plaintiff prove his case by deposition. As a result, your opinion request is directed to the following:

"- - - If a plaintiff is a nonresident and complies with the procedural matters required before taking, I cannot see why they cannot be read in a Magistrate Court to prove his case."

It is to be noted that in rendering this opinion, it will be assumed that a nonresident plaintiff of the State of Missouri has complied with the statutory procedural requirements for taking depositions.

Section 492.110, RSMo 1959, establishes the right to obtain a commission to take the deposition of an out of state witness. Said section states:

"When the witness resides out of this state, the party desiring his testimony may sue out of the court in which the suit is pending, or out of the office of the clerk thereof, a commission to take the deposition of the witness."

In addition, Section 492.220, RSMo 1959 (Supreme Court Rule 57.14), confers the right of a party to a suit

Honorable Dwight Beals

pending in any court of record to obtain a commission to take a deposition. Thus, depositions may be obtained of witnesses in a pending suit in a Magistrate Court because said Court is one of record. This rule was stated in State v. Blocher, 361 Mo. 1107, 238 S. W. 2d 361, l.c. 363:

"Magistrate courts are now courts of record and in pending cases over which they have jurisdiction are expressly empowered under the constitution and the existing statutes. Mo. R.S. 1949, Secs. 492.110, 492.220 to issue commissions to take depositions upon written interrogatories."

An indication that the legislature intended that depositions could be used in magistrate courts is evidenced by the language of Sections 492.130 (Supreme Court Rule 57.05), 492.360 (Supreme Court Rule 57.28), and 517.600, RSMo 1959.

Both Section 492.130 (Supreme Court Rule 57.05), which enumerates the powers and duties of an officer under a commission to take depositions, and Section 492.360 (Supreme Court Rule 57.28), which directs the manner in which the officer taking the depositions and exhibits shall be filed with the court state, in part: "to the court in which or the magistrate before whom the action is pending." Section 517.600 of Chapter 517, RSMo 1959, dealing with Magistrate Court procedure refers to "other witnesses who testify orally or by deposition."

Since a deposition is permissible in an action pending in Magistrate Court, it may be used therein in the same manner that a deposition may be used in Circuit Court. This is due to Section 517.640, RSMo 1959, which states:

"The proceedings upon the trial of suits before magistrates with respect to the examination of witnesses, the submission of evidence and argument, and the order and conduct of the trial, shall, when no other provision is made by law, be governed by the usage and practice in the circuit court, so far as the same may be applicable."

Honorable Dwight Bealt

In *Felks v. Burnett*, 47 Mo.App.564, an action on an oral contract was involved. Defendant's counsel, after first showing defendant was a nonresident of the county wherein the case was tried, and was temporarily absent from the state, offered to read in evidence defendant's deposition. Trial court refused to permit the reading of defendant's deposition on the ground that it was the deposition of one of the parties to the suit. At said time Section 8918, RSMo 1889, was identical to Section 492.080, RSMo 1959.

In holding that the trial court erred in not admitting defendant's deposition, the St. Louis Court of Appeals stated at page 566:

"A party to a suit may obtain the deposition of any witness, and, therefore, his own, as he is a competent witness to be used conditionally. When the witness resides in another county than the one in which the suit is tried, his deposition may be read in evidence."

Furthermore, Supreme Court Rule 57.01 (a) states, in part, as follows:

"Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes."

From the foregoing, it is clear that a plaintiff's deposition may be taken in a pending suit, in magistrate court, and may be conditionally read in evidence at trial in said court.

Since the plaintiff in this matter is a nonresident of the State of Missouri and not present at trial, his deposition may be read in evidence in a civil action in magistrate court to prove his case.

CONCLUSION

Honorable Dwight Beals

If a plaintiff in a civil action in magistrate court is a nonresident of the State of Missouri and not present at trial, his deposition may be used to prove his case, provided he has complied with the statutory procedural matters relating to the taking of said deposition, as well as to its introduction during trial.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

November 17, 1961



Honorable Paul S. Bell
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Mr. Bell:

This is in reply to your opinion request of July 27, 1961, wherein you state:

"I have a situation in the county where the School Board has sold and removed the fire escapes to a building which was abandoned by the School District. According to my information this sale was made without any advertisement whatsoever. I would like your opinion on two points: First, is it necessary for a School Board to advertise the sale of personal property before selling. Second, if it is necessary and the School Board fails to do so, does that constitute a crime which should be prosecuted by the Prosecuting Attorney.

122.091
"Section 165.370 of RSMo 1959, makes some reference to advertising but does not seem to include all sales of personal property by a School Board and Section 165.160 would seem to make any wilful neglect to advertise a misdemeanor if such advertising is necessary before selling personal property."

162.091
Section 165.160 RSMo 1959 states:

"Any district or county clerk, county superintendent, county treasurer, school director, or other officer, who shall

willfully neglect or refuse to perform any duty or duties pertaining to his office imposed upon him by law, shall be regarded as guilty of a misdemeanor and subject to a fine of not more than one hundred dollars, to be recovered in any court of law in this state having competent jurisdiction."

In essence, said statute makes it a crime for wilful neglect or failure of school district officers to perform their duties. Said statute creates no offense in the situation where the officers do act pursuant to their statutory authority, but violate such authority by not following the mandate of the statute.

Section 165.160, RSMo 1959, is a criminal statute, and as such must be strictly construed. In order to impose liability under such a statute its provisions must have been literally fulfilled.

Since the school board did sell the school personal property in the district, the fact that said board did not advertise the sale of said property would not render said board criminally liable under Section 165.160, RSMo 1959.

In conclusion, it may be stated that if the school board sells school property that is no longer required for the use of the district without advertising the same, said sale will not render the board criminally liable under Section 165.160, RSMo 1959.

Because of the foregoing conclusion, it becomes unnecessary to determine whether or not the school board was required to advertise this personal property for sale under Section 165.370, RSMo 1959.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

COUNTIES:
COUNTY OFFICERS:

Class 2 county officers are not authorized by the provisions of Section 50.660 to make purchases of \$100.00 or less without approval of county court and certification of county auditor.

March 23, 1961



Honorable Earl R. Blackwell
Senate Post Office
Capitol Building
Jefferson City, Missouri

Dear Senator Blackwell:

This is in response to your request for an opinion dated February 20, 1961, which reads as follows:

"Several county officials in Jefferson County, being a county of the 2nd class, have requested me to obtain an opinion from your office on the following question:

"Under Section 50.660, RSMo 59, or other provisions of the Laws, can county office holders in counties of the 2nd class make purchases in amounts of \$100.00 or less from any one person, firm, or corporation during any period of thirty days? In other words, can they individually make such purchases without going through any other department of county government?"

Section 50.660, RSMo 1959 provides as follows:

"All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment or services other than personal made by the officer in charge of purchasing in any county having the officer. No contract or order imposing any financial obligation on the county is binding on the county unless it is in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise

Honorable Earl R. Blackwell

unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred and unless the contract or order bears the certification of the accounting officer so stating; except that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it is sufficient for the accounting officer to certify that the bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of the bonds yet to be sold or of the taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there is one, except that the advertising is not required in case of contracts or purchases involving an expenditure of less than five hundred dollars, in which case notice shall be posted on the bulletin board in the courthouse. It is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days. All bids for any contract or purchase may be rejected and new bids advertised for. Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment or services other than personal therein described, in the quantities required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer, as herein provided; but all orders for supplies, materials, equipment or services other than personal shall bear the certification. In case of such contract,

Honorable Earl R. Blackwell

no financial obligation accrues against the county until the supplies, materials, equipment or service other than personal are so ordered and the certificate furnished."

Prior to its repeal and re-enactment in 1957, the foregoing section placed a twenty-five dollar maximum on purchases where competitive bids were not necessary. The most recent repeal and re-enactment, V.A.M.S. 1959, S.B. 64, effected no substantial changes in this section.

Sections 50.760 and 50.780, RSMo 1959, pertain to the acquisition of items needed for the operation of counties of the second class and must also be considered in determining the authority for and method to be followed in making purchases. Section 50.760 reads as follows:

"It shall be the duty of the judges of the county court in all counties of the second class, on or before the first day of February of each year, to determine the kind and quantity of supplies, including any advertising or printing which the county may be required to do, required by law to be paid for out of the county funds, that will be necessary for the use of the several officers of such county during the current year, and to advertise for sealed bids and contract with the lowest and best bidder for such supplies. Before letting any such contract or contracts the court shall cause notice that it will receive sealed bids for such supplies, to be given by advertisement in some daily newspaper of general circulation published in the county, such notice to be published on Thursday of each week for three consecutive weeks, the last insertion of which shall not be less than ten days before the date in said advertisement fixed for the letting of such contract or contracts, which shall be let on the first Monday in March, or on such other day and date as the court may fix between the first Monday of March and the first Saturday after the second Monday in March next following the publication of such notice; provided, that if by the nature or quantity of any article or thing

Honorable Earl R. Blackwell

needed for any county officer in any county of this state to which sections 50.760 to 50.790 apply, the same may not be included in such contract at a saving to such county, then such article or thing may be purchased for such officer upon an order of the county court first being made and entered as provided in sections 50.760 to 50.790; and provided further, that if any supplies not included in such contract be required by any such officer or if the supplies included in such contract be exhausted then such article or thing may be purchased for such officer upon order of the county court first being made and entered of record as provided in sections 50.760 to 50.790."

Section 50.780 provides:

"It shall hereafter be unlawful for any county or township officer in any county to which sections 50.760 to 50.790 apply to purchase any supplies not contracted for as provided in sections 50.760 to 50.790, for his official use and for which payment is by law required to be made by the county, unless he shall first apply to and obtain from the county court an order in writing and under the official seal of the court for the purchase of such supplies, and in all cases where the supplies requested by such officer have been contracted for by the county court as provided in sections 50.760 to 50.790, the order shall be in the form of a requisition by said officer addressed to the person, firm, company or corporation with whom or which the county court has made a contract for such supplies, and presented to the county court for approval or disapproval; and unless approval be given such requisition shall not be filled and any such requisition filled without such approval shall not be paid for out of county funds. The county shall not be liable for any debts for supplies except debts contracted as provided in sections 50.760 to 50.790. The best price and the quality of supplies shall be considered and supplies of a higher price or quality than is reasonably required for the purposes to which

Honorable Earl R. Blackwell

they are to be applied shall not be purchased or contracted for. Preference to merchants and dealers within their counties may be given by such judges, provided the price offered is not above that offered elsewhere."

The portion of Section 50.760 referring to advertising for competitive bids has been construed by a previous opinion of this office "to include the ordinarily foreseeable items to be used by the various county officials in the conduct of their offices." Opinion of Attorney General to Frank D. Connett, Jr., January 27, 1955, attached herewith.

Upon the premise that Section 50.660 must be read so as to harmonize with Sections 50.760 and 50.780, if at all possible, it appears to us that the portion of Section 50.660 which gives rise to your question ("It is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days.") must be construed to govern only the maximum purchase that may be made without advertisement for bids rather than the officers who may make the purchases or the method they may follow.

In this connection, your attention is invited to the final proviso clause of Section 50.760 which reads as follows: "and provided further, that if any supplies not included in such contract be required by any such officer or if the supplies included in such contract be exhausted then such article or thing may be purchased for such officer upon order of the county court first being made and entered of record as provided in Sections 50.760 to 50.790." Moreover, Section 50.780 makes unlawful the purchase of any supplies by any county or township officers "not contracted for as provided in Sections 50.760 to 50.790" unless the county court has previously issued a written order for the purchase of such supplies.

It should also be noted that, subject to the exceptions set out therein, Section 50.660 specifies as prerequisites to a binding contract that there be a balance "otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury * * *, each sufficient to meet the obligation incurred" and that the contract bear the certification of the accounting officer so stating. Inasmuch as "accounting officer" as used in Section 50.660 means county auditor, Section 50.530, RSMo 1959, it would also be necessary that the contract be submitted to the county auditor for the required certification.

Honorable Earl R. Blackwell

CONCLUSION

It is the opinion of this office that Section 50.660, RSMo 1959, does not authorize a county officer of a county of the second class to make purchases in amounts of one hundred dollars or less without securing the approval of the county court in the manner required by Sections 50.760 and 50.780, RSMo 1959. As a condition to its validity, the proposed contract must also be certified by the county auditor as required by Section 50.660, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:cr
Enclosure



July 10, 1961

Honorable Earl R. Blackwell
Senator, 22nd District
Hillsboro, Missouri

Dear Senator Blackwell:

In your letter of July 5, 1961, you requested the opinion of this office as to whether Senate Bill 318, 71st General Assembly, authorizes the County Clerk of Jefferson County to retain a fee of five dollars which must be paid to him by persons applying for building permits in that county.

Senate Bill 318 authorizes the county courts of certain second class counties to require the securing of building permits by persons in those counties who seek to erect structures which are in excess of \$600 in value.

The pertinent part of Senate Bill 318 reads as follows:

"3. Upon receipt of such application the county clerk of such county shall immediately prepare a building permit in the customary form and shall issue the same to the applicant upon the payment by the applicant of the building permit fee of five dollars."

We enclose an opinion of this office issued to the Honorable Haskell Holman on November 7, 1953, which states the applicable law on this subject. That opinion holds that unless the legislature specifically provides otherwise, the fees of the county clerk are accountable and hence cannot be retained by the county clerk. Since nothing in Senate Bill 318 indicates that the fees are to be unaccountable, then the reasoning of the enclosed opinion forces the conclusion that the \$5.00 building permit fee cannot be retained by the county clerk.

Very truly yours,

BE:BJ

THOMAS F. EAGLETON
Attorney General

October 3, 1961



Honorable Channing D. Blaeuer
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This is a letter of advice and not a formal opinion in response to your letter of July 3, 1961, requesting our views on whether or not a special road district has the right to regulate parking and vehicular traffic on public roads within the district, and if so, how violations of the regulations may be enforced.

The general law governing the use of public highways is stated in 40 C.J.S., Highways, Section 232, page 240:

"As the highways of the state are public ways, see supra § 1, they are subject to public control. Thus, subject to constitutional restrictions, the state, through its legislature, has primarily the power to control and regulate public highways and the use thereof, subject only to limitations of reasonableness and equality and to the requirement that regulations do not unreasonably interfere with the rights of travel or other proper public uses of the highways, although the power cannot be restricted within too narrow bounds. This power is an exercise of the police power of the state to protect the highways, and promote the safety, peace, health, morals, and general welfare of the public."

In the same paragraph, i.e. 242, it is further stated:

Honorable Channing D. Blaeuer

"In the absence of a delegation of power, discussed infra subdivision b of this section, local authorities have no right of control or regulation over the highways of the state, any power of the local authorities to regulate traffic on the highways within their jurisdiction being subordinate to the state legislature and subject to the general laws of the state dealing with such matters, unless the general law expressly makes local regulations paramount. Thus, where by statute the power to control and supervise state highways has been vested in a state highway commission, local authorities have no such power over such highways within the confines of the locality."

In the case of *State ex rel. Audrain County v. City of Mexico*, 197 SW2d 301, the court, in holding that the City of Moberly had the authority to install parking meters on that part of the county used as a public street, said at l.c. 302:

"Highways exist primarily for the purpose of travel and transportation, and parking thereon for any extended period is a privilege. 40 C.J.S., Highways, § 233, p. 244. In 1812, it was stated in *Rex v. Cross*, 3 Campbell, 224, a case involving the parking of stage coaches on a street, that: 'No one can make a stableyard of the King's highway.' The highways are subject to reasonable regulation and supervision by the State in the exercise of its police power. *State v. Dixon*, 335 Mo. 478, 481[2], 73 S.W. 2d 385, 387[2]; *Park Trans. Co. v. State Highway Comm.*, 332 Mo. 592, 599, 60 S.W. 2d 388, 390[5]. The State may delegate this power. 40 C.J.S., Highways, § 232, p. 240; 25 Am. Jur. p. 544, Secs. 253-255."

The court further found that the State of Missouri had, by statute, delegated express authority for municipalities to regulate vehicular traffic within its boundaries and that regulating automobile parking is a valid exercise of the state's delegated police power. Section 304.120, RSMo 1959.

Honorable Channing D. Blaeuer

The police power is an attribute of sovereignty and exists without any reservation in the Constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society. The police power of the state may, in the absence of any constitutional restriction, be delegated to municipal corporations.

The next question, then, is, has the authority to regulate traffic or parking been delegated to special road districts.

Section 233.070, RSMo 1959, relating to city and town road districts, gives the district exclusive control over public highways therein to construct, improve, repair and remove obstructions from such highways, and shall have such powers as are conferred by general law upon road overseers. We find no express statutory authority given to special road districts to regulate traffic or parking on public roads in their district. Chapter 231, RSMo 1959, relates to the appointment and duties of road overseers. We find no express authority given to road overseers to regulate traffic or parking on public roads.

The authority given commissioners of special road districts by statute is the right to construct, improve, repair and maintain public roads, but no reference is made to the authority to regulate traffic or parking on such roads. It follows, therefore, that since the power to regulate traffic belongs to the state and it has not been expressly or by necessary implication delegated to commissioners of special road districts, it would appear that the power in such districts does not exist. Section 304.130, RSMo 1959, authorizes county courts in class one counties to control traffic on public roads outside of incorporated areas in such county. This appears to be the only statute authorizing any county to regulate traffic on public roads. Counties, like other public corporations, can exercise only powers granted them by statute, either in express language or necessarily and clearly implied in language incident to powers expressly granted. Any reasonable doubt concerning the existence of a power must usually be resolved against the exercise of such power. *Lancaster v. Atchison County*, 352 Mo. 1039, 180 SW2d 706. It therefore appears that, since there is no statute expressly authorizing third class counties to exercise the power, Randolph County does not have such power.

Sections 304.021 and 304.024, RSMo 1959, relate to authority of the State Highway Commission. However, these statutes would not aid in the solution of this problem since the roads involved are not under the jurisdiction of the State Highway Commission.

Honorable Channing D. Blaeuer

We therefore must conclude that we find no authority for either this road district or the county to regulate or prohibit parking in the situation involved in your inquiry. We do not know whether this is an accidental oversight of the Legislature or whether it is an intentional withholding by the Legislature of the power to regulate traffic and parking on country roads.

We do, however, wish to make some observations as to solutions which you might consider. It occurs to us that either the road district or the county court, even though it has no authority to do so, might erect "no parking" signs at the place where it is felt desirable and necessary. You might then utilize Section 229.170, and perhaps even Section 229.150 which makes obstructions of the highway a misdemeanor. We, of course, recognize that it is possible that these two sections may well be construed as not applying to the parking of automobiles, nevertheless you may consider it wise or useful to try that approach and test the question of whether those statutes do apply. We offer these ideas merely by way of suggestion for your consideration and possible use if you think that they might be helpful in the solution of your problem. We hope you will understand that this is not an expression of an opinion of this office that these statutes do in fact apply to the situation you have in mind.

We hope that these observations may be of some aid or assistance to you.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

By

J. Gordon Siddens
Assistant Attorney General

JGS:ml:aa

October 6, 1961



Honorable Earl R. Blackwell
State Senator
22nd District
Hillsboro, Missouri

Dear Mr. Blackwell:

This letter is in answer to your request for an opinion of this office, dated September 27, 1961.

Section 311.290 RSMo prohibits the sale of intoxicating liquor on the days on which certain specified elections are held. However Section 311.290 applies only to certain elections at which candidates for public office are to be elected or nominated and does not apply to a city election for the purpose of increasing city taxes.

No law has been found which requires that saloons and liquor stores be closed during a city election to increase taxes. Thus the fact that saloons and liquor stores remained open during such election would be immaterial to the validity of that election.

If we can be of help to you in the future, please do not hesitate to contact us.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GDS:aa

ROAD DISTRICTS:
COUNTY COURTS:
COUNTIES:
ROADS AND BRIDGES:

Both a County Court and Special Road District (authorized under Section 233.010 RSMo 1959) may expend funds, under authority of Section 234.210 RSMo 1959, to finance a preliminary engineering survey, the purpose of which is to determine the feasibility of constructing an inter-state bridge across the Mississippi River.

November 8, 1961



Honorable Earl R. Blackwell
State Senator, 22nd District
Hillsboro, Missouri

Dear Senator Blackwell:

We are in receipt of your request for an opinion of this office which reads as follows:

"Can a Special Road District and/or a County Court contribute toward a fund for an engineering survey, the purpose of which survey is to determine the feasibility of constructing a bridge across the Mississippi River?

"By way of further explanation, it should be stated that the Bi-State Agency has expressed an interest in assuming the project for constructing a bridge across the Mississippi River to link Jefferson County, Missouri, with Monroe County, Illinois. However, before the project can begin, a preliminary engineering survey must be completed to determine the feasibility of such a bridge. An amount of \$15,000.00 is needed for this preliminary survey, and the Bi-State Agency has stated that the two counties must raise the funds for said survey inasmuch as the Agency has neither the power nor the money for such a survey. It should also be stated that if the feasibility survey is favorable, and the bridge is ultimately constructed, the money which was expended for the survey will be returned to the contributors.

Honorable Earl R. Blackwell

"Trusting I may have an opinion from your office on the above question, I remain"

In an additional letter to us under date of October 24, 1961, you stated that the road district involved was of the type authorized by Section 233.010 RSMo 1959.

We first direct your attention to the sections of the Missouri statutes which deal with the authority of road districts and county courts to build interstate bridges. Section 234.210 RSMo 1959 reads as follows:

"Any county, municipality, road district, political or civil subdivision of a county or of the state, severally or acting with other authorized agencies in this or adjoining states, may acquire, own and operate, construct, or aid in the construction, in whole or in part, improve or extend, and maintain toll bridges, including the approaches thereto, either within or adjacent to the territory over which such public agency has jurisdiction and over any of the rivers and waters in or forming the boundary between this and other states."

Section 234.090 RSMo 1959 reads as follows:

"1. If a bridge or bridges be necessary over any river, stream or watercourse forming the boundary line or part of the boundary line between the state of Missouri and any adjoining state or states, the county courts of the counties of this state bordering on such river, stream or watercourse may unite with such adjoining state or the proper authorities of any county in such adjoining state for building such bridge or bridges and the expense thereof shall be defrayed by such county of this state and the adjoining state or county therein in such proportion as may be agreed upon.

"2. The plans and specifications for such bridge or bridges shall be prepared and the contract let and construction supervised by some competent person who may be agreed upon by the respective interested

authorities; provided, that private subscriptions may be received by the county courts of such counties in this state to defray in part or in whole the expenses of building such bridge or bridges; provided further, that for the purpose of defraying the expenses of building such bridge or bridges, or to create a fund with which to build any such bridge in the future, it shall be the duty of the county court in such county in this state, upon a petition signed by a majority of the taxpaying citizens of any township in which such bridge is located or is to be located, to levy on the taxable property in such township the full amount of the special road and bridge tax authorized by the first sentence of the first paragraph of section 12, article X of the Constitution of Missouri, and use the same solely for the purpose of defraying the expense of building such bridge or bridges or creating a fund for the future building thereof, and such fund, when inaugurated, shall be perpetuated until such bridge or bridges are built and the cost thereof is defrayed.

"3. The county court may appropriate moneys from the road and bridge fund of the county to pay the cost or part of the cost of building such bridges."

County courts have such power and authority as is expressly granted them or as can be necessarily implied from their express powers. *King vs. Maries County* (1923) 297 Mo. 488, 249 S.W. 418; *Everett vs. Clinton County* (1955) 282 S.W. 2d 30; 20 C.J.S., Counties, Section 82, p. 849. A similar rule applies to the powers of road districts, 39 C.J.S., Highways, Section 157, p. 1108.

We will therefore now turn to a consideration of Sections 234.090 RSMo, 1959, and 234.210 RSMo 1959 to see if authority for the project stated in your request is therein contained.

Honorable Earl R. Blackwell

We do not believe that authority for the project mentioned in your request can be found in Section 234.090 RSMo 1959. This section, in any event, applies only to county courts and not to road districts; but, still further, it authorizes county courts to unite, for bridge building purposes, only with an adjoining state or authorities of a county in an adjoining state. The Bi-State Development Agency does not fall within either of these categories.

We turn, therefore to a consideration of Section 234.210 RSMo 1959. This section authorizes both counties and road districts to "construct" or "aid in the construction" of toll bridges by acting in conjunction with agencies of the State of Missouri or of other states. An agreement with the Bi-State Development Agency would be within the terms of this statute.

Do either of the terms "construct" or "aid in the construction" include within their meaning a preliminary survey to determine the feasibility of building a bridge?

"Construct" was defined by the Missouri Supreme Court in the case of *State ex rel St. Louis County vs. State Highway Commission* (1926) 286 S.W. 1, 2, as follows:

"* * * 'construct' means to put together the constituent parts of something in their proper place and order * * *"

From the above definition it can be seen that "construct" means the actual erection, building or fabrication of an object. This word, therefore, would not confer authority on road districts and county courts to finance the preliminary survey mentioned in your opinion request.

We come then to a consideration of the phrase "aid in the construction".

The verb form of "construction" has been above defined. The word "aid" is defined in *Black's Law Dictionary*, 4th Edition, 1951, p. 91, as follows:

"To support, help, assist, or strengthen. *Hines v. State*, 16 Ga. App. 411, 85 S.E. 452, 454.
Act in cooperation with. *Cornett v. Commonwealth* 198 Ky. 236, 278 S.W. 540, 542."

In the case of *Marsch v. Bartlett* (1938) 343 Mo. 526, 121 S.W. 2d 737, the Missouri Supreme Court gave a similar definition for the

Honorable Earl R. Blackwell

word, although it was there used in a different context. In construing a constitutional amendment concerning the Conservation Commission and authorizing the General Assembly to pass legislation "in aid" of the provisions of the amendment, the court said that the term signified support, help, and assistance.

To "aid in the construction" of a bridge, therefore means to assist or help in the erection, fabrication or building of a bridge. It is the opinion of this office that by participating in the preliminary survey mentioned in your request, the road district and county court involved would be assisting in the building of the bridge. The actual erection of the bridge must be preceded by a survey to determine its feasibility. This necessity brings the proposed survey within the statute, specifically with the terms "aid in the construction".

CONCLUSION

It is the opinion of this office that both a county court and a special road district organized under Section 233.010 RSMo 1959 have authority to contribute toward a fund for an engineering survey, the purpose of which is to determine whether it is feasible for the Bi-State Development Agency to construct a bridge across the Mississippi River.

The foregoing opinion, which I hereby approve, was prepared by my assistant Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EE:ms

COUNTY HEALTH CENTERS: Board of health center trustees managing county health center governed by Secs.
COUNTIES: 205.150 RSMo 1959 is vested with authority to expend monies derived from its authorized tax levy for the purpose of erecting a health center building on premises leased from the Federal Government.

May 24, 1961



Honorable Robert Bonney
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Mr. Bonney:

This opinion is rendered in reply to your inquiry reading, in part, as follows:

"The Wayne County Health Unit and The Wayne County Court have requested that I write your office and request an official opinion on whether the county health unit can properly use county moneys to erect a health center building on leased land from the Federal Government for a fifty-year term. * * *"

In a telephone conversation with you the "County Health Unit" referred to in the above inquiry has been demonstrated to be a county health center organized under and subject to the provisions of Sections 205.010 to 205.150, RSMo 1959.

Article IV, Section 37, Missouri's Constitution of 1945 provides:

"The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

A power vested in the board of health center trustees, and particularly germane to the authority to lease grounds for the county health center, is found in the following language from Section 205.042, RSMo 1959:

Honorable Robert Bonney

" * * * They shall have the exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, and of the purchase of site or sites, the purchase or construction of any county health center buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose. * * *"
(Underscoring supplied)

In the foregoing quoted language from Section 205.042, RSMo 1959, we find authority expressly given to the board of health center trustees to lease ground for the purposes of the health center and to construct buildings thereon. When you referred to "county moneys" in the question posed in the forepart of this opinion we assume you were making reference to the monies derived from the tax levy duly made by the county court for the sole use and benefit of the county health center and certified by the board of health center trustees under authority found in Section 205.045, RSMo 1959.

CONCLUSION

It is the opinion of this office that the board of health center trustees managing the county health center governed by Sections 205.010 to 205.150, RSMo 1959, is vested with authority to expend monies derived from its authorized tax levy for the purpose of erecting a health center building on premises leased from the Federal Government.

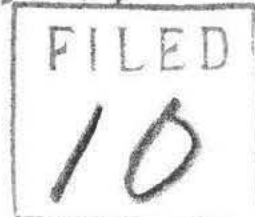
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JLO:M:aa

See #31-1959 (7-23-59)
To Patrick O. Freeman.
also #204-1962. To
Chas A Powell Jr. 5-2-62



July 7, 1961

Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Boulware:

This is in reply to your letter of May 5, 1961,
wherein you state:

"I have been asked by neighbors to institute proceedings in the Probate Court to have one Virginia Winkler declared incompetent and have a guardian appointed for her. The neighbors believe that she is squandering her inheritance which she received about two years ago. They also state that she is neglecting her three small children all under twelve years of age and that she is giving large sums of money to a man she is living with but to whom she is not married. They also state that she has a very low I.Q. and is not mentally capable of making decisions in business matters.

"None of the neighbors however, will sign a petition alleging her to be incompetent and insist that it is my duty as Prosecuting Attorney to have the Sheriff sign this petition and have a hearing. If there has been an Attorney General's opinion on this question of the Prosecuting Attorney's duties under these circumstances, I would appreciate a

copy of this opinion. If not, I would appreciate an opinion defining the duties and responsibilities of the Sheriff and the Prosecuting Attorney when confronted with this situation."

Enclosed you will find an opinion of this office, dated March 11, 1954, to Robert E. Crist, Prosecuting Attorney of your county. Said opinion holds that the prosecuting attorney may represent the sheriff in a sanity hearing in which the sheriff was the informant.

At the time of this opinion, however, Section 458.040, RSMo 1949, specifically provided that "Whenever any . . . sheriff. . . shall discover any persons, resident of his county, to be of unsound mind, . . . it shall be his duty to make application to the probate court for the exercise of its jurisdiction; . . ."

However, Chapter 458 was repealed in 1955 (Laws 1955, p.385). Under Chapter 475, RSMo 1959, which deals with guardianship, no section is found equivalent to Section 458.040, RSMo 1949. Thus, there is presently nothing in the Missouri Statutes which expressly states that the sheriff must file a petition with the probate court when he believes a resident of his county is incompetent of managing his affairs or caring for himself.

Although, Section 475.055(2), RSMo 1959, specifically excludes sheriffs from being appointed guardians of a person or his estate, Section 475.060, RSMo 1959, states: "Any person may file a petition for the appointment of himself or some other qualified person as guardian of a minor or an incompetent."

Section 475.085, RSMo 1959, states: "The costs of an inquiry into the competency of any person shall be paid from his estate if he is found incompetent or, if his estate is insufficient, costs shall be paid by the county; but if the person is found not incompetent the costs shall be paid by the person filing the petition, unless he is an officer acting in his official capacity, in which case the costs shall be paid by the county." (Underlining ours)

Thus, it is indicated that although, pursuant to

Section 475.055(2), RSMo 1959, a sheriff cannot be appointed guardian of an incompetent's estate, he may under Section 475.060, RSMo 1959, file a petition in such a matter for the appointment of a qualified individual as guardian, and may do so in his official capacity as sheriff. In such an event, if the individual is not deemed incompetent, the county would pay the costs under Section 475.085, RSMo 1959.

Although such a proceeding is civil in nature, yet it is a matter in which the state is an interested party (see State v. Holtkamp, 51 S. W. 2d 13, page 4 of enclosed opinion), and as such, has a duty to protect the incompetent and the public. (See State v. Skinker, 126 S.W. 2d 1156, and State v. Guinotte, 257 Mo. 1, page 2 of enclosed opinion).

Thus, it would seem incumbent upon the sheriff in such a case where the county officials feel that an individual within the county is incompetent and unable to manage his affairs to file the petition for the appointment of some qualified person as guardian under Section 475.060, RSMo 1959.

Since such action on the part of the sheriff is for the benefit of the residents of the county, including the alleged incompetent, and therefore an action in which the county is concerned, it would be the duty of the prosecutor under Section 56.060, RSMo 1959, to prepare such petition for the sheriff and represent him in this action before the Probate Court.

Said Section 56.060, RSMo 1959, in defining the duties of a prosecuting attorney states:

"Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, . . . "

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD 1c
1 enclosure

August 29, 1961



Honorable Earl A. Bollinger
State Representative - Madison County
604 Buford Boulevard
Fredericktown, Missouri

Dear Mr. Bollinger:

This is in reply to your letter of August 7, 1961, requesting the opinion of this office as to whether a trustee of a county hospital may sell drugs to that institution at no profit.

Your attention is invited to subsection 5, Section 205.170 RSMo 1959 which provides as follows:

"No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for said hospital, unless the same are purchased by competitive bidding."

As stated in that subsection, the only exception to the general prohibition against trustees having a pecuniary interest in the purchase of any supplies for the hospital arises where there is competitive bidding. Thus even the absence of profit to the trustee would not permit him to sell drugs to the hospital if there were no competitive bids submitted.

In an opinion issued by this office at the request of Fred C. Bollow under date of June 30, 1948, attached herewith, the conclusion was reached that public policy of the State of Missouri would prevent a member of a county school board from selling supplies to the school. Inasmuch as Section 205.170, supra, departs from that general rule, it is submitted that any contracts made under the exception set out therein would be subject to close scrutiny and would not be regarded with favor by the courts of this state.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:aa
Enclosure

TAXATION:
TAX EXEMPT REALTY:
CHARITABLE PURPOSES:
EXCLUSIVELY USED FOR
CHARITABLE PURPOSES:

On the facts submitted, real estate owned by Cat's Pause, a not for profit corporation in Shelbina, Missouri, is used for purposes purely charitable.

October 19, 1961



Honorable Rolin T. Boulware
Prosecuting Attorney of
Shelby County
Shelbyville, Missouri

Dear Mr. Boulware:

We are in receipt of your recent request for an opinion as follows:

"The County Court of Shelby County and other interested persons have requested that I ask your office for an opinion regarding the legality of an assessment made by the County Assessor of Shelby County of the Teen Town building owned by the Cat's Pause, a not for profit corporation, in Shelbina, Missouri. The Teen Town organization is represented by Bollow, Crist and Oswald of Shelbina, Missouri and I am enclosing a copy of a letter which they wrote to the State Tax Commission setting out the facts in detail.

"We would like an opinion whether the real estate owned by the Cat's Pause is or is not exempt from taxes as a charitable organization under Article 10, Section 6 of the 1945 Constitution, and under Section 137.100 (5) R.S. Mo. 1959."

In *Young Men's Christian Ass'n v. Sestric*, 362 Mo. 551, 242 S.W. 2d 497, 1.c. 505 the court stated:

"Each of these tax exemption cases is peculiarly one which must be decided upon its own particular facts."

Honorable Rolin T. Boulware

It is thus apparent that in determining whether a particular parcel of real estate is exempt from taxes, general language in previously decided cases which broadly state applicable principles would not necessarily be decisive of any other case. Obviously, no two cases are exactly alike. Facts differ. And occasionally credibility of witnesses is a factor in ascertaining the facts themselves. For such reason, the views herein expressed are limited to the precise factual situation outlined in the letter, copy of which you have enclosed with your request. Moreover, in our instant ruling we have assumed not only that there are no other facts at all from which contrary inferences may be drawn, but that a full development of the facts by testimony of witnesses would not thereby alter or modify any of the facts herein assumed to be true.

Following are the admitted and assumed facts as stated in such letter:

"The 'Cat's Pause' is an organization incorporated under the Missouri not for profit incorporation act. The purposes of this corporation as stated in its articles are in relevant part: 'to promote moral, intellectual and physical well being of youth . . . to maintain . . . entertainment and a recreation hall, friendly counsel, advise and assist and to encourage group participation by youth in rational social amusements.'

"The purposes clause further provides that the corporation may acquire real and personal property to further the end of the general purposes as stated. The purposes clause further provides that the purpose of the corporation is to operate not for profit.

"In connection with these purposes, the corporation did purchase a building at a price of \$6,000.00, with no down payment, but with payments of \$66.62 a month principal and interest. To date they have paid a total of \$973.60.

"The building is set up to provide simple meals, sandwiches, hot and cold drinks, and general simple restaurant type services. There is of course a juke box, booths, tables, and an area for a dance floor.

"The corporation itself employs a person to manage all of these described activities in the building. The activities are of course commensurate to the physical plant and include dances, a general meeting place for teenagers, other entertainment in the nature of amusement machines which include the juke box and a pinball machine.

"All of the proceeds go into a general fund of the Cat's Pause and are in turn used for expenses. There are not very adequate account books because the actual income has never been sufficient to pay the expenses and the organization relies upon donations from members in the community who believe in the organization and who want to keep it going . . .

"The entire activities of the Cat's Pause are simply to provide a meeting place for teenage children and to furnish them with the things they demand at that age, being primarily food, soft drinks, a place to dance and amuse themselves under adult supervision."

Section 137.100, RSMo 1959, provides in part that there shall be exempt from taxation "all property, real and personal, actually and regularly used exclusively . . . for purposes purely charitable, and not held for private or corporate profit." Under this section property is exempt from taxation only if such property is not held for private or corporate profit and is used exclusively for purposes purely charitable.

It is clear from the facts as above stated that the property in question is not held for private or corporate profit. The question then is whether such property is used exclusively for purposes purely charitable.

Our Supreme Court is now committed to "a broad concept of the term 'charitable purposes'". *Young Men's Christian Ass'n. v. Sestric*, 362 Mo. 551, 242 S.W. 2d 497, 502. In that case it was said:

"'Charitable purposes' include those, the accomplishment of which makes it likely that persons affected will

Honorable Rolin T. Boulware

become substantial and useful citizens and less likely that they will become burdens on society."

In the above Young Men's Christian Ass'n. case, the property was held to be tax exempt. Some of the activities carried on included sponsorship and supervision of numerous boys clubs to prevent juvenile delinquency, and sponsorship of "community boys work". The stated purposes of Y. M. C.A., including among others the purpose to provide for the welfare for young people by furnishing facilities and places of abode in a wholesome and Christian environment were held to be charitable purposes within the statute exempting property devoted to such purposes from taxation. The fact that the organization operated facilities such as residence halls, cafeterias, barber shops, candy and tobacco counters, cleaning and pressing shop, and an athletic department, was held not to destroy the tax exemption, the court having determined as a fact that there was no profit making purpose in connection therewith, but rather that such use was intimately connected with the accomplishment of the purely charitable purpose of furnishing to young men a total environment in order to accomplish the development of Christian character and fellowship and in order to foster good citizenship and Christian ideals.

In Salvation Army v. Hoehn, 354 Mo. 107, 188 S.W. 2d 826, a large hotel building used by the Salvation Army for providing board and lodging for women, especially those of lower earning capacity and income, under wholesome and decent influences and with proper protection and surroundings calculated to inculcate Christian character and develop good citizenship was held, under the facts, to be used exclusively for purposes purely charitable. The court emphasized that the phrase "exclusively used" has reference to the primary and inherent use of the property, and in such connection ruled that the fact that charges were made for the services did not defeat the exemption.

In Bader Realty & Investment Co. v. St. Louis Housing Authority, 358 Mo. 747, 217 S.W. 2d 489, property employed in a low rent housing project was held to be exclusively used for purposes purely charitable. The avowed purpose of the housing authority was to free areas of congested population from the menace of slums and from crime and juvenile delinquency which results from slum housing. To accomplish such purpose, numerous housing units unfit for proper human habitation were demolished and more modern housing was constructed and rented to low income families.

Honorable Rolin T. Boulware

In *Christian Businessmen's Committee v. State*, 228 Minn. 549, 38 N. W. 2d 803, 1.c. 812, it was held that "the maintenance of a youth center where young people may gather for recreation in a wholesome atmosphere undoubtedly is a contribution to the public good", and such use was held to be a charitable one. The court ruled that the operation of a restaurant and other services incidental to such youth center did not affect the tax exempt status of the property.

The stated purpose of Cat's Pause is to promote moral, intellectual and physical well being of youth. To accomplish such purpose the property in question is exclusively used for a meeting place of teen age children where wholesome activities are carried on under adult supervision. The project appears to be sponsored and subsidized by good citizens of the community. We are of the opinion that the use of the property for the purpose stated serves to aid in the prevention of juvenile delinquency and to develop good citizenship. The fact that there is no religious overtone, as in the Y. M. C. A. and Salvation Army cases, is of no consequence. The further fact that food and soft drinks are sold and amusement machines provided does not affect our conclusion that the property is exclusively devoted to purposes purely charitable. Such other uses are intimately connected with the accomplishment of the purely charitable purposes of the Cat's Pause. We believe that such uses are subordinate to and reasonably necessary in meeting needs integrated with the purely charitable purposes of the organization. The dominant purpose for which the property is used is charitable, and, therefore, under the decisions of the Supreme Court the property is exclusively used for charitable purposes.

CONCLUSION

It is the opinion of this office that, on the facts submitted, real estate owned by Cat's Pause, a not for profit corporation, (a teen-town type of organization in Shelbina, Missouri) is used for purposes purely charitable and, therefore, is exempt from taxation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

CRIMINAL LAW: BONDS:
SUPREME COURT RULES:
SURETIES: BAIL BONDS:
MUNICIPAL COURTS:

A person is not disqualified as a surety in municipal and traffic courts solely because he employs persons who have been convicted of a felony but this fact together with other facts and circumstances may be considered by the court in determining whether the person meets the reputable person requirement of Section 37.107, Rules of the Supreme Court of Missouri.

April 4, 1961 ✓



Honorable Jasper M. Brancato
Member Missouri State Senate
Capitol Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request of January 31, 1961, for an opinion of this office, which request reads as follows:

"I am contemplating on introducing a bill in the Senate - subject matter pertaining to the legality of any person who has been convicted of a felony, whether or not, he can be employed in a bonding company where they come in contact with a Municipal Judge.

"I would appreciate a legal opinion on this matter at your earliest convenience."

In a subsequent letter you advised that the bonding company referred to in your request is owned by an individual and is not incorporated.

Rule 37 of the Rules of the Supreme Court of Missouri relates to the practice and procedure to be followed in municipal and traffic courts. The qualifications for individual sureties on bail bonds in municipal and traffic courts are set out in Sections 37.107 and 37.108, Vernon's Annotated Missouri Rules. These Sections read as follows:

Honorable Jasper M. Brancato

Section 37.107:

"No person shall be accepted as a surety on any bail bond taken under these Rules unless he possesses the following qualifications:

"1. He shall be a reputable person, at least twenty-one years of age and a bona fide resident of the State of Missouri.

"2. He shall not have been convicted of a felony under the laws of any state or of the United States.

"3. He shall not be an attorney-at-law, a peace officer, a constable or a deputy constable.

"4. He shall not be an elected or appointed official or employee of the State of Missouri or of any county or of any other political subdivision or any municipality of this state.

"5. He shall have no outstanding final forfeiture or unsatisfied final judgment thereon entered upon any bail bond in any court in this state or of the United States." (Emphasis ours)

Section 37.108:

"In addition to the qualifications specified in Rule 37.107, no person shall be taken as a surety on any bail bond unless he shall be the owner of real estate or personal property having a reasonable market value in excess of all encumbrances, exemptions and all other liabilities, at least equal to the amount specified in the bond which he proposes to execute. In order to qualify upon the basis of real estate owned, a person must be the sole, legal and equitable record owner in fee simple. Where there are several sureties, the aggregate reasonable market value of real estate or personal property owned by them in excess of all encumbrances, exemptions and all other liabilities, shall be at least equal to the amount specified in the bond."

It would appear that the qualifications contained in the above quoted portions of Rule 37, supra, apply only to an individual who desires to sign as surety on a bail bond in municipal and traffic courts. Therefore, a person would not be disqualified as a surety

under numbered paragraph two of Section 37.107, supra, because he has a person or persons in his employ who have been convicted of a felony. However, it is believed that the court may consider the fact that a person has in his employ persons who have been convicted of a felony together with other facts and circumstances in determining whether the person meets the "reputable person" requirement of numbered paragraph one of Section 37.107, supra.

CONCLUSION

Therefore, it is the opinion of this department that a person is not disqualified as a surety in municipal and traffic courts solely because he employs persons who have been convicted of a felony but this fact together with other facts and circumstances may be considered by the court in determining whether the person meets the reputable person requirement of Section 37.107, Rules of the Supreme Court of Missouri.

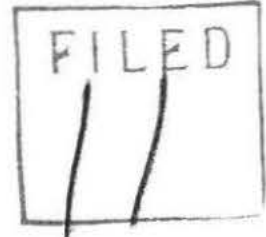
The foregoing opinion, which I hereby approve, was prepared by my assistant, Calvin K. Hamilton.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

NONSUPPORT: A criminal action for nonsupport of children
CHILDREN: brought against a father pursuant to Section
WIFE: 559.350, RSMo 1959, can be instituted in the
VENUE: county wherein the father resides even
though the children are nonresidents of the
state.

July 17, 1961



Honorable F. M. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Brady:

This is in reply to your request wherein you seek an opinion from this office as to the possibility of a non-resident divorcee prosecuting her former husband, a resident of Missouri, under Section 559.350, RSMo 1959, for nonsupport of their two children who are and have been residents of Arizona.

The facts as outlined by you are as follows:

"Complaint has been made to me by a resident of the State of Arizona that a resident of Benton County, Missouri, has unlawfully and willfully, without good cause, failed, neglected and refused to provide adequate food, clothing, lodging and medical attention for his two children, aged 6 years and 12 years.

"She wants to have her former husband prosecuted in Benton County, Missouri, for nonsupport of his two children under Section 559.350 R.S.Mo., as amended Laws 1953.

"The complaint is the former wife of the man she wishes to prosecute and the facts as I understand them are as follows:

"Complainant and her former husband were living in the State of Arizona,

Honorable F. M. Brady

with their family, and separated some four or five years ago. The husband came to Benton County, Missouri, and filed suit for a divorce, which was granted, and the wife was given the custody of their then three minor children and \$150.00, per month for support of the three children. Later the older boy grew up and went into service and the father filed motion in the circuit court to reduce the amount of support he was required to pay for the support of child now 12 years of age and the child now 6 years of age to \$80.00 per month. This was several months ago, and the father has paid nothing toward the support of the two children since then.

"The mother of the two children and the two children live and have lived in and been residents of the State of Arizona since and before the separation of the parents. The father is now a resident of Benton County, Missouri.

"I would like to have your opinion as to whether or not a prosecution can be maintained against the father in Benton County, Missouri, under Section 559.350, as amended by laws of 1953, for his nonsupport of his two children who are residents of the State of Arizona."

Succinctly, Section 559.350, RSMo 1959, is a criminal statute whereby a man or woman is guilty of a misdemeanor if he or she, without good cause, abandons or deserts or without good cause fails, neglects or refuses to provide adequate food, clothing, lodging, medical or surgical attention for his or her children under the age of sixteen years. Said section further provides that it shall be no defense to the charge that the father does not have the care and custody of the child or that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical atten-

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tion for said child.

Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, venue must be laid in the county of the offense.

However, in criminal prosecutions of fathers for non-support or desertion of their children, the courts have looked to the intent and purpose of the desertion and abandonment statutes in order to determine the proper venue.

As stated in Annotation, 44 A.L.R. 2d 886, at 891:

"In determining venue under statutes penalizing nonsupport a distinction is sometimes made according to whether the primary purpose of a statute is to prevent the neglected child from becoming a charge upon the county, in which case venue may be properly laid in that county, notwithstanding the father's nonresidence, or whether it is to punish the delinquent father, in which case the venue is properly laid in the county of his residence, notwithstanding the child's nonresidence."

Prior to its amendment in 1947, the courts of Missouri interpreted the statute making it a misdemeanor for a father to abandon or neglect his child as not punitive in purpose but rather to prevent the child from becoming a public charge. Thus, if a defendant, in a nonsupport or desertion case, could prove that a third party was adequately providing for said child, he would be acquitted of such charge. As early as 1911, the Supreme Court of Missouri, in *State v. Thornton*, 134 S. W. 519, 1.c.521, construing Section 4492, RSMo 1909, stated:

"The Legislature did not enact this law for the purpose of punishing parents for failure to do their duty as such. Such a purpose would smack too strongly of

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paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the state, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution. It follows from the foregoing that if infant children are receiving necessary food, clothing, and lodging from any source, there is no occasion for the state to interfere by penal law or otherwise. Construing section 4492 in the light of the above reasoning, and as applied to the facts in this case, it denounces a penalty for refusal or neglect to supply an infant child with such food, clothing, and lodging as it actually needs."

Again, in 1929, the St. Louis Court of Appeals gave the same meaning and interpretation to Section 4026, RSMo 1929, in the case of State v. Barcikowsky, 143 S. W. 2d 341, 1. c. 342. In doing so, the court quoted the language used in State v. Thornton, supra.

Thus, under the Missouri Statute prior to its amendment in 1947, the proper venue for criminal action of child abandonment or desertion was the residence of the child. In 1927, in the case of State v. Hobbs, 220 Mo.App.622, 291 S.W. 184, defendant was charged with willfully and unlawfully and without good cause failing and neglecting to maintain and provide necessities for his two children, who resided with their mother in Cape Girardeau County. Defendant was a resident of Stoddard County. Although stating that no hard and fast rule could be laid down which would categorically fix the venue for every case of a failure to support children by a parent, the court stated:

"In the instant case, we think, the venue may be properly laid in Cape Girardeau county where the children were residing, and where, it is alleged, they were being neglected by the father in the necessities of life. It was there that they were receiving no such contribution as the law requires the parent to furnish them."

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The Hobbs case was cited with approval by the Supreme Court in State v. Winterbauer, 318 Mo. 693, 300 S.W. 1071.

In 1947 the statute was amended by adding two important features to the act (Section 559.350, RSMo 1959). The first feature was that a father was guilty of a misdemeanor if he, without good cause, failed, neglected or refused to provide adequate food, clothing, lodging, medical or surgical attention for his children, "whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; . . ."

Therefore, this eliminated the defense available under the statute prior to its amendment, that it was necessary for the state to prove destitution or physical or material want of the child.

The second feature was to eliminate the defense by the father that a third party was adequately caring for the needs and wants of the child. This language stated, "and it shall be no defense to such charge that the father does not have the care and custody of the child or children or that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children; . . ."

By adding these two features, the legislature clearly indicated its intention to remove the purpose of the statute from the category of one designed to prevent a child from becoming a public charge and a burden on society to the category of deterring fathers from abandoning or neglecting their children and punishing fathers in the event they did so.

In view of these amendments, the question is whether the foregoing cases are still in point. We are of the view that by reason of the statutory changes, a Missouri father who fails to support his children residing in another state has violated Section 559.350 and may be prosecuted in the county of his residence.

In Commonwealth v. Acker, 197 Mass.93, 83 N.E. 312, the Supreme Court of Massachusetts held that a father, a resident of Massachusetts, could be prosecuted for failure

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to support his child who was born in Nova Scotia, residing there at time of trial, and had never been in Massachusetts:

"While one of the objects of the statute is doubtless to prevent wives and children from becoming a charge upon the public for their support, this is not its chief purpose. The higher and more important purpose of the Legislature in passing the law was to provide directly for neglected wives and children, and to punish the infliction of this kind of wrong upon them, and, by the fear of punishment, to deter husbands and fathers from leaving their families to endure privation. There is nothing either in the words or the object of the statute that should limit its application to cases where the neglected person happens to be in this commonwealth at the time of the neglect, or at the time of the prosecution for it. A person domiciled in this commonwealth is amenable to the statute, whether his minor child is here when the wrong upon him is committed, or has been carried out of the commonwealth by his father, or has been left by him in another state or country; if, while residing and having his domicile here, he unreasonably neglects to provide for the child. The offender is here, within our jurisdiction. While residing here he ought to make provision for the support of his wife and minor children, whether they are here or elsewhere. If he fails to do this, his neglect of duty occurs here, without reference to the place where the proper performance of his duty would confer benefits."

In the case of *Poindexter v. State*, 193 S. W. 126, 1.c. 129, the Supreme Court of Tennessee, in holding that a father could be tried in the county of his residence, for failure to support his child who resided in another county, stated:

"There is an apparent conflict in the

Honorable F. M. Brady

decisions on the question of venue in proceedings under statutes such as the one upon which this prosecution is based

"It is said in Ruling Case Law that this conflict may be explained by the different provisions of the statutes; that some of the statutes have for their chief and primary purpose to prevent the neglected wife or child from becoming a charge upon the county; that prosecutions under such statutes should be brought in the county where the wife or child resides, since the purpose is to prevent that county from having to support the wife or child. / Other statutes have for their primary purpose the protection of the dependent wife or child by punishing the delinquent husband and father to deter others from being guilty of the same wrong. Under the latter statutes the venue should be laid in the county where the husband or father resides and where he is under legal as well as moral obligation to provide for his family. . . .

"Our statutes are of the last-named class."

In *State v. James*, 203 Md. 113, 100 A. 2d 12, the Supreme Court of Maryland, in holding that a father, residing in Maryland, could be prosecuted under a Maryland statute for nonsupport of his children, who were residents of Delaware, stated:

"There is another line of cases . . . holding that the purpose of a nonsupport statute is not only to prevent a neglected wife or child from becoming a public charge, but that the higher and more important purpose of the Legislature was to assist deserted or neglected wives or children in directly procuring support, to punish the infliction of this

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kind of wrong upon them, and by the fear of such punishment to deter husbands or fathers from leaving their families to endure privation. The cases so reading the statutes hold that one within the State is amenable to the statute, whether his wife or children are in the state or not. On the theory of these cases, the offender within the jurisdiction must make provision for the support of his wife or children while residing there, whether they reside there or elsewhere."

In further support of its position, the Court stated:

"There is no doubt that a State has the legislative power to make a resident subject to criminal prosecution for failure to support a dependent who lives outside of the State. Restatement, Conflicts of Laws, Section 457. . . 'Thus, a State in which a minor child is domiciled may impose a duty upon a parent who is for any reason subject to the jurisdiction of that state irrespective of whether the parent is domiciled there or in another state. Conversely, a state may impose a duty upon a parent who is domiciled in the state although a child is neither domiciled in the state nor otherwise subject to the jurisdiction thereof.' "

In 1957, the Missouri Supreme Court, in *Ivey v. Ayers*, 301 S. W. 2d 790, was called upon to determine the constitutionality of Missouri Uniform Reciprocal Enforcement of Support Law (Sections 454.010-454.360, RSMo 1959). In said case, the Court used the following language, l. c. 795:

"It has long been the rule in this state that a father has the duty to support his minor children We know of no reason why this duty does not extend to a minor child across a state line."

Honorable F. M. Brady

As a result of the conclusion hereinafter stated, the opinion of this office to the contrary, dated March 17, 1951, to Stanley Wallach, Prosecuting Attorney, St. Louis County, Clayton, Missouri, is herewith withdrawn for the reason that, in our view, the former opinion does not take into account the legislative intent of the 1947 amendment to change the purpose of the statute so that, as presently worded, its purpose is primarily to punish parents for neglect of their duty as such and to deter others from committing like offenses. That being so, State v. Hobbs, 291 S.W. 184, and State v. Winterbauer, 300 S. W. 1071, are no longer in point, since they construed the former statute, the purpose of which was to prevent children from becoming public charges. The former opinion cites these cases as authority for holding that prosecution can be maintained only in the county of the childrens' residence (which would preclude any prosecution at all when the child is a nonresident). However, neither of these cases ruled this point. All that was held therein was that in the circumstances of those cases, prosecution was maintainable in the county where the child resided. They did not decide (nor could they, since the question was not presented) that even under the former statute prosecution in the county of the father's residence would be improper. In fact, the Hobbs case specifically ruled that the circumstances of each case must be considered in order to reach a reasonable and just conclusion on the issue of venue, and the circumstance that the child is a nonresident should impel the conclusion, which is both just and reasonable, that venue in the county of the father's residence is proper. Moreover, since both Hobbs and Winterbauer involved the statute prior to its 1947 amendment (when the purpose was to prevent the child from becoming a public charge), it was reasonable under that statute to require prosecution in the county where the child had become a public charge.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that a criminal action for non-support of children brought against a father pursuant to Section 559.350, RSMo 1959, can be instituted in the county wherein the father resides even though the children are

Honorable F. M. Brady

nonresidents of the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD 1c

December 4, 1961



Mr. Arthur V. Burrowes
First Vice-President
St. Joseph Library Board
2925 Mitchell
St. Joseph, Missouri

Dear Mr. Burrowes:

The St. Joseph Library Board has requested that I render an official opinion on the effect of certain aspects of the new Charter of the City of St. Joseph as it relates to the Library Board's structure.

Copy of that request is attached hereto and, because it shows that you initiated the motion upon which the request was made, I direct my reply to you.

So as to minimize the opportunity for misunderstanding I have paraphrased the questions below and it is to those paraphrased queries that my answers are directed.

First, you wonder if you, as a unit of government of the city, have the right to request an official legal opinion of me.

This is not a question of your right to request but of my right to answer in view of the prerogatives of the St. Joseph City Attorney. Bearing that in mind I will state that the Attorney General is required by constitution and statute to represent certain state officers and institutions, rendering to them such legal assistance as they may require. These do not include cities and city officials or city institutions.

However, since you receive state library funds and since the continued legality of the disbursement of such funds to you are in question, I deem it advisable to express to you what I believe the state's position should be in that respect.

Mr. Arthur V. Burrowes December 4, 1961

You are concerned as to whether your Library Board shall consist of the five members generally provided for in Section 16.1 of the new charter or of nine members as set out specifically in Chapter 182, RSMo 1959.

The pertinent part of Section 16.1 of the charter states:

"Except as otherwise specifically provided by the laws of Missouri or this charter, all boards and commissions established or authorized by this charter shall consist of five members . . ."

The charter establishes a library board in Section 16.6, which further provides at 16.6(4):

"The library board shall, notwithstanding any provisions of this charter, be constituted and appointed and have such powers and duties as are now prescribed by the General Statutes for library boards in all cities of this state."

Thus the charter defers to state statute for the composition of boards and commissions generally and for the library board specifically where the statutes specifically provide for a number of members other than five.

In view of the section of the charter last above referred to it is clear that it is intended that the general state statutes control. According to the general statute establishing library boards (§ 182.170, RSMo 1959) they shall consist of nine members.

You are further troubled about continuing the present nine members in office.

This is controlled by Section 20.19 of the charter as follows:

"The members of all boards now provided for in the City and continued by this charter shall remain in office until the end of their present term or three years from the adoption of this charter, whichever shall first occur, when their successors shall be appointed in accordance with this charter. * * *"

Mr. Arthur V. Burrowes December 4, 1961

The nine board members now serving were appointed under 182.320, RSMo 1959. Their terms are for three years, three of which expire on June first of each year. Therefore, none of the incumbents can be serving a term to extend beyond June first of 1964. Since the three year time limit in Section 20.19 of the charter runs from the date of the adoption of the charter which was subsequent to June first 1961 there is no conflict between it and the term of any member now serving.

In view of all of the foregoing it would appear that when the charter of the City of St. Joseph goes into effect next April the library board should consist of nine members.

At such time the nine members serving should continue in office until the expiration of their respective terms.

Although I am not permitted to render an official opinion to you and this letter is not an official opinion, I will advise that you should have no trouble in receiving state funds for your library system due to the composition of your library board if the above suggestions are followed.

Yours very truly,

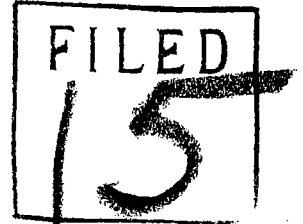
THOMAS F. EAGLETON
Attorney General

HLM:BJ

SURPLUS COMMODITIES:
COUNTY COURTS:
COUNTY OFFICERS:
COUNTY CLERK:
COUNTY TREASURER:
COUNTY SUPERINTENDENT
OF SCHOOLS:

Judges of the county court are prohibited from receiving extra compensation from county for services they render in distribution of surplus commodities. County clerk and county treasurer may receive extra compensation from the county for services they render beyond their official duties in the distribution of surplus commodities. County superintendent of schools may receive compensation from the county for any service he renders in the distribution of surplus commodities.

September 8, 1961



Honorable Proctor N. Carter
Director of Welfare
Division of Welfare
State Department of Public
Health and Welfare
Jefferson City, Missouri

Dear Mr. Carter:

In your letter of July 12, 1961, you request an opinion on the following matter:

"Under the provisions of Senate Bill No. 147, 71st General Assembly, State funds have been made available authorizing the Division of Welfare to pay one-half of the cost of surplus commodities distribution, such distribution having been made by any County or any City not within a County. This Bill carried an emergency clause and became effective on April 10, 1961. The Division of Welfare is authorized to reimburse a County or City in an amount equal to 50% of the sum expended during a particular month 'provided the expenditures have been approved by the Division of Welfare'.

"In a few Counties requests for reimbursement have included extra compensation paid to County Judges, County Clerks and County Treasurers for services performed in distributing surplus commodities. The Counties from which such requests have been received are all Third and Fourth Class Counties.

Honorable Proctor N. Carter

"In determining whether or not to approve the requests for reimbursement as to extra compensation paid to County Judges, County Clerks and County Treasurers for services rendered in the distribution of surplus commodities I would appreciate receiving an opinion from you as to the validity of extra compensation payments being made to such County Officials for their services."

After submitting the above request, you have made an additional request to include in our opinion whether the county superintendent of schools would be entitled to receive compensation for services rendered by him in connection with the administration of the surplus commodity program.

You want to know whether county judges, county clerks, county treasurers, or county superintendents of schools may receive extra compensation from the county for services performed by them in the distribution of surplus commodities in the county.

Senate Bill 147, recently enacted by the Legislature, provides in part:

"Section 1. Any county or any city not within a county may establish a program for the acquisition, storage and distribution of surplus agricultural commodities to needy persons pursuant to acts of the congress of the United States, and may rent, lease or otherwise provide the necessary storage and distribution facilities therefor. The county or city may enter into contracts or agreement with any other county or city not within a county for the establishment and operation of a joint program or for the joint use of facilities or services.

"Section 2. The director of the division of welfare of the department of public health and welfare shall make and promulgate necessary and reasonable regulations for the administration of the programs established pursuant to section 1, and for the certification of the eligibility of recipients of the commodities.

"Section 3. The division of welfare of the department of public health and welfare shall, on or about the fifteenth day of each

Honorable Proctor N. Carter

month reimburse any county or city not within a county in an amount equal to fifty per cent of the sum expended by the county or city for the acquisition, warehousing and necessary cold storage, safe-keeping, maintenance of proper records and distribution of surplus agricultural commodities during the preceding month; provided the expenditures have been approved by the division of welfare."

Under Section 1 any county or any city not within a county may establish a program for the acquisition, storage and distribution of surplus agricultural commodities to the needy persons pursuant to the acts of Congress of the United States. When the county decides to enter into this program it becomes a county function and is to be governed by the terms of this statute and other provisions of law applying to county governments.

The judges of the county court, county clerk, county treasurer and county superintendent of schools are all county officials and the law applicable to public officials should be applied.

We shall first state some general principles of law that apply to public officials. In 20 C.J.S., Counties, § 114, the law regarding extra compensation for county officials is stated as follows:

"Where the salary or compensation of a county official is definitely fixed by law, it is generally held that such sum is intended to include his entire official remuneration, and to preclude extra charges for any services whatsoever, unless it is clear that the statute contemplated and intended additional compensation for certain extra services. The basic test, however, is whether the services on which the claim for additional compensation rests were within the scope of duties imposed by the statute fixing the compensation; and compensation may be recovered by a county official for the performance of services entirely outside the scope of the duties of the office, where the services were performed under a lawful contract with the county commissioners. Generally speaking it may be said that when enumerating the fees which a particular officer may charge it will be presumed that

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the legislature meant to designate with precision the services for which he should receive fees, and that such fees should be his full compensation for services incidental to his office. In arriving at these conclusions, the courts apply the general rule that, where a statute imposes a duty on a public officer, it is presumed to be performed by him in consideration of the general emoluments of his office, unless the legislature has clearly indicated that compensation shall be paid for the performance of the duty so imposed."

In 159 A.L.R. Ann., p. 606, 607 and 608, it is stated:

"As a general rule the salary attached to a public office constitutes the full compensation for all the services required to be performed by a public officer, so that he may not assert a right to additional compensation although by statute or ordinance the duties of his office, as it was constituted at the time of his appointment, have been increased, or he has performed additional services which are merely incidental to the duties of his office."

"(1) If the extra services which the officer undertakes to perform at an agreed extra compensation are a part of or germane to the official duties of his office or are merely incidental to those duties, the existence of an express contract for additional compensation does not prevent the operation of the rule referred to supra, I, that he is not entitled to extra compensation for extra services rendered by him. In such case the contract for additional compensation is invalid as against public policy."

The above rules apply when an officer is performing his official duties. When an officer performs duties outside of his official duties the rule is stated, as follows, in 43 Am. Jur., Public Officers, § 364:

"The law does not, of course, forbid extra compensation for extra services which have no affinity or connection with the duties of the office. Where the duties

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newly imposed upon the officer are not merely incidents of and germane to the office, but embrace a new field, and are beyond the scope and range of the office as it theretofore existed and functioned, the incumbent may be awarded extra compensation for the performance of such duties without violating a constitutional inhibition against increase of salary during the term. The rule has been applied to allow extra compensation to an officer employed outside his official duties to conduct litigation for the public, or to an officer rendering services of such a character that he is called upon to risk or give his life or incur permanent disablement. So, a health officer, unless prevented by statute, may recover reasonable compensation for extra services performed by him during an epidemic."

In State ex rel. Forsee v. Cowan, 284 S.W. 2d 478, 1.c. 481, it is stated:

"The law in Missouri is well established that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. Gammon v. Lafayette County, 76 Mo. 675; State ex rel. Evans v. Gordon, 245 Mo. 12, 149 S.W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; Jackson County v. Stone, 168 Mo. 577, 68 S.W. 926; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S.W. 504; Bates v. City of St. Louis, 153 Mo. 18, 54 S.W. 439, 77 Am.St.Rep. 701; Williams v. Chariton County, 85 Mo. 645. * * * Maxwell v. Andrew County, 347 Mo. 156, 146 S.W.2d 621, 625. " In so far as concerns compensation for services, there is a very imperfect analogy between services rendered by a public officer and those rendered by one individual to another in a private capacity. The law implies in the latter case a promise to pay as much money as the services are reasonably worth, whereas the compensation for services of a public officer is in

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most cases fixed by positive law. If the fixed compensation is more than the service is worth, the public or party must pay it; if less, the officer must be content with it." 43. Am. Jur., sec. 362, p. 150.' Alexander v. Stoddard County, Mo.Sup., 210 S.W.2d 107, 109. See also State ex rel. Harrison v. Patterson, 152 Mo.App. 264, 132 S.W. 1183."

"Now, the law is also clear that '[e]ven in the absence of statutory prohibition and even though the work or services consist of "extra services," if they are in point of fact a part of or germane to the official duties of his office, the officer's employment, for obvious reasons, is against public policy and he is not entitled to compensation for performing the services. Annotations 84 A.L.R. 936; 159 A.L.R. 606.' Polk Tp., Sullivan County v. Spencer, Mo.Sup., 259 S.W.2d 804, 805. See also Tyrrell v. Mayor, etc., of City of New York, 159 N.Y. 239, 53 N.E. 1111, 1112; 43 Am. Jur., 'Public Officers', § 363, p. 151."

Since the question you have submitted deals with four separate and distinct county officers, each with different duties and responsibilities, it is necessary to discuss each official separately in this opinion.

Article VI, Section 7, of the Constitution of Missouri provides in part that the county court shall manage all county business as prescribed by law, and keep an accurate record of its proceedings.

When a county court decides to participate in the program for distribution of commodities to the needy people under Senate Bill 147, such a program becomes a county responsibility and has to be administered by the county court. Therefore, the responsibility and duties of administering the program become the duty and responsibility of the judges of the county court. It becomes their duty to administer and supervise the acquisition, storage and distribution of the commodities. In doing so they can act only in their official capacities as members of the county court because under the statute and the constitution such authority is vested in them. However, under Senate Bill 147 the director of the Division of Welfare has authority to promulgate reasonable rules and regulations concerning the administration of this program, which regulations would be binding on the county court.

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Section 49.140, RSMo 1959, provides as follows:

"No judge of any county court shall, directly or indirectly, become a party to any contract to which the county is a party, or act as a road or bridge commissioner, either general or special, or keeper of any poor person."

The preceding statute was construed by the Supreme Court in *Nodaway County vs. Kidder*, 129 S.W. 2d 857. In that case the presiding judge of the county court of Nodaway County has received his salary as a member of the county court. In addition, he received extra compensation for inspecting the county roads and bridges and made miscellaneous trips to purchase supplies for the benefit of the county, for which he received additional compensation. He contended that this additional work was done as employee of the county under an agreement with the other members of the county court. The Supreme Court made the following statement, 1.c. 860:

"[5-7] The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S.W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S.W. 195, 196; *State ex rel. Wedeking v. McCracken*, 60 Mo. App. 650, 656.

"[8] It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S.W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S.W. 655; *Williams v. Chariton County*, 85 Mo. 645.

[9,10] The duties performed by appellant, and for which the additional fee or salary and mileage was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of

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the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties.

"It has been held that employment as city attorney, for which a salary was paid, includes services rendered in connection with a special tax matter, and that compensation as city attorney covers such service, and that a city collector may not contract with such city attorney for additional compensation for services in such matters. *Edwards v. City of Kirkwood*, 162 Mo. App. 576, 579, 142 S.W. 1109."

In the above case, after referring to the above-quoted statute, the court stated that the alleged agreement between the appellant and the county court, of which appellant was a member, was voided under the express terms of the statute. The court also stated such a contract would be void as against public policy even in the absence of such a statute, and made the following statement, l.c. 861:

"[11,12] Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. *Town of Carolina Beach v. Mintz*, 212 N.C. 578, 194 S.E. 309; 46 C.J. 1037 Sec. 308."

In *Polk Tp., Sullivan County v. Spencer*, 259 S.W. 2d 804, the defendant was a member of the township board and, in addition to his compensation at the rate of \$2.50 per day as allowed by statute, he was also paid by the county 75 cents per hour for work and labor on the roads and bridges in his township. His employment was authorized by the other two members of the board who approved his accounts and issued the warrants in payment for his services. This was a suit by the township to recover the monies that had been paid the defendant in excess of the statutory compensation. In deciding this case, the court stated, l.c. 805:

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"[1-3] Unquestionably, the general rule is 'that an officer of a public corporation cannot become personally interested in a contract with the board of which he is a member, or in a contract with such public corporation with reference to the performance of any labor or services as to which he has in any way a public duty to perform, either by overseeing or passing upon such labor, or auditing or allowing a claim therefor, or directing the payment thereof.' Annotation 34 L.R.A., N.S., 129, 131; Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857. Even in the absence of statutory prohibition and even though the work or services consist of 'extra services,' if they are in point of fact a part of or germane to the official duties of his office, the officer's employment, for obvious reasons, is against public policy and he is not entitled to compensation for performing the services. Annotations 84 A.L.R. 936; 159 A.L.R. 606. It was a part of Spencer's duties as a member of the township board to audit all claims, and it was the board's duty to construct, repair and improve roads 'and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor.' Section 229.040, RSMo 1949, V.A.M.S. In short, the services performed by Spencer were a part of and germane to his official duties and his employment by the board was against public policy."

When a county decides to participate in the program for the distribution of surplus commodities under Senate Bill 147, it will have to be administered by the county court and the judges thereof. They will be responsible for the acquisition, storage and distribution of the commodities as promulgated by the Division of Welfare. This will include the performance of any of the work that is necessary for them to perform in their official capacities.

Since this program has to be administered by them and under their supervision, it is our opinion that the county judges are prohibited from entering into any agreement to accept and are prohibited from accepting any compensation from the county for any services rendered by them in connection with the distribution of surplus commodities. They are not only prohibited under

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Section 49.140, supra, but in the absence of such a statute and even though the work consists of services over and above their official duties they are prohibited from receiving any extra compensation from the county for such services since it would be against public policy.

In regard to the county clerk, there is no statute especially prohibiting him from contracting with or from receiving compensation from the county in addition to his statutory compensation as county clerk for any work performed by him in addition to his official duties. Therefore, whether he is entitled to receive additional compensation for any services he might render in administering the surplus commodities program must be determined by application of other principles of law.

As hereinbefore stated, the right of a public official to receive compensation for the performance of his duties depends upon whether the statute provides for compensation. Therefore, if the county clerk has any official duties to perform in connection with the distribution of the commodities, he would not be entitled to any additional compensation for performing those duties because there is no statute allowing him any additional compensation.

Section 51.120, RSMo 1959, provides in part that the county clerk shall keep an accurate record of the orders, rules and proceedings of the county court; keep an accurate account of all monies coming into his hands on account of fees, costs or otherwise, and punctually pay over the same to the person entitled thereto.

Section 51.150, RSMo 1959, in part requires the county clerk to keep regular accounts between the county treasurer and the county, charging him therein with all monies paid into the treasury, and crediting him with the amounts disbursed; to keep just accounts between the county and all persons chargeable with monies payable into the county treasury, or that may become entitled to receive monies therefrom; to file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party and shall issue warrants on the treasury for all monies ordered to be paid by the county, keep an abstract thereof, and present the same to the county court at every regular term, and balance his accounts as often as the court requires.

We believe it is fair to assume that the county clerk in his official capacity will be required by the county court to keep records on the commodities received and the manner of distribution. It is also probable that the director of the

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Division of Welfare will require the county to keep certain records. In doing so, the county clerk would be acting in his official capacity because any records which the county court would be required to keep, the county clerk would be under duty to keep them. It is our opinion that under the authorities heretofore cited, the county clerk could not receive any extra compensation for performing this clerical work in keeping the records.

The question then arises as to the county clerk performing services outside his official duties, such as transporting commodities or other work other than clerical work. The county clerk would not be under any official duty to perform such work, and such work would not be germane to his official duties.

We have been unable to find any court decisions in this state on the question of a county officer receiving compensation from the county for performing work beyond the scope of his official duties.

The general rule of law is stated in 43 A.J.P., Public Officers, 364, supra. The rule is also stated in 67 C.J.S., Officers, § 88, as follows:

"Where the duties of an officer are increased by the addition of other duties germane to the office without provision for compensation, the officer must perform such duties without extra compensation. So, an officer is not entitled to extra compensation because additional duties pertaining to the office have been assumed by him or imposed on him by the exigencies of the office. Services required of officers by law for which they are not specifically paid must be considered compensated by the fees allowed for other services.

"On the other hand, an officer is not obliged, because his office is salaried, to perform all manner of public service without additional compensation, and for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration. In this connection, although service not required by the law cannot be classed as official duties, nevertheless public policy requires that courts should not favor nice distinctions in order to declare certain acts of public officers extraofficial.

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"Extra services, as applied to services of officers, are services incident to their offices for which compensation is not provided by law."

In the case of State ex rel. Langford v. Kansas City, 261 S.W. 115, the question before the court was whether a deputy sheriff could serve as city clerk at the same time. The court, at page 116, said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S.W. 639):

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two - some conflict in the duties required of the officers as where one has some supervision of the other, is required to deal with, control, or assist him."

Applying these principles of law to the county clerk, it would appear that he is not prohibited from receiving compensation from the county for extra services performed by him in connection with the distribution of surplus commodities, provided the services he performs are not within his official duties. It is our opinion that the county clerk may accept employment from the county and receive compensation from the county under the above conditions.

In regard to the county treasurer receiving extra compensation from the county for performing services in connection with the distribution of surplus commodities under Senate

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Bill 147, we find no statute expressly prohibiting the county treasurer from contracting with or accepting employment with the county, and his right to receive compensation would have to be determined by the general principles of law applicable to county officials.

The statutory provisions pertaining to the county treasurer are found in Chapter 54, RSMo 1959. In substance they provide for the county treasurer to furnish an account of the receipts and expenditures of the county, to divide the revenue of the county as provided by law, to pay out the revenue thus divided on warrants issued by the county court, from the proper funds, and to keep a separate account of each fund, to make a settlement with the county court of his accounts at stated times, to be custodian of certain school funds and perform certain other duties pertaining to the above.

There is no statutory provision prohibiting the county treasurer from holding more than one office at the same time or from prohibiting him from entering into any contract with the county. Applying the above-stated principles of law, the county treasurer would be prohibited from receiving any compensation for additional work required of him in keeping the records and performing his duties in the office, but he would not be prohibited from receiving additional compensation from the county for doing work beyond his official duties. It is our opinion that the county treasurer may receive compensation from the county for any work performed by him in connection with the distribution of surplus commodities other than his clerical work which he is required to do by law.

The statutory provisions dealing with the office of the county superintendent of schools is found in Chapter 167, RSMo 1959. Section 167.100 provides that during his term of office the county superintendent of schools shall not engage in teaching or in any other employment that interferes with the duties of his office. There is no statute expressly prohibiting him from entering into contracts with the county or from receiving any additional compensation from the county for work performed by him and which work is not germane to his official duties. We find no statute requiring the county superintendent of schools to participate in any manner in the distribution of surplus commodities, and if he does so it is aside from his official duties.

Under the above stated principles of law, it is our opinion a county superintendent of schools would not be prohibited from contracting with the county or from accepting employment with the county and receiving compensation from the county for any service he might render the county in the distribution of surplus commodities as provided in Senate Bill 147.

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CONCLUSION

1. In conclusion, it is the opinion of this office that the judges of the county court are prohibited from receiving extra compensation from the county for services they render in the distribution of surplus commodities under Senate Bill 147.

2. It is also the opinion of this office that a county clerk is not entitled to extra compensation for any services rendered by him in his official capacity such as keeping the necessary records required by the county court in connection with the distribution of surplus commodities, but that the county clerk is not prohibited from receiving additional compensation from the county for any services he may render which have no connection with his official duties.

3. It is our opinion that a county treasurer is not entitled to receive extra compensation from the county for any services he may render in his official capacity, but he is not prohibited from receiving compensation from the county for services he renders over and above his official duties in connection with the distribution of surplus commodities.

4. It is our opinion that a county superintendent of schools has no official duties to perform in the distribution of surplus commodities by the county, and that he may contract with and receive compensation from the county for any services he renders in the distribution of surplus commodities under Senate Bill 147.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Very truly yours,

MM:BJ

THOMAS F. EAGLETON
Attorney General

December 8, 1961



Honorable Milton Carpenter
State Treasurer
State Capitol
Jefferson City, Missouri

Attention: M. G. Lindsey, Chief Clerk

Dear Sir:

This refers to your letter of June 18, 1961, and subsequent consultation between Mr. Lindsey and Mr. Baumann, concerning checks drawn on accounts administered by you as trustee.

Your letter contained a general inquiry as to the statutes governing such checks. However, it is our understanding that your specific question at this time is whether checks drawn on trust accounts are governed by the following provisions of Section 30.200, RSMo 1959:

"Outstanding checks or drafts drawn by the treasurer, if not presented for payment within one year from the date of issuance, shall be void and the state treasurer shall print or cause to be printed upon all checks, drafts or evidence of payment due, the following:

'If not presented for payment within one year from the date of issuance, this
(insert draft or check, etc.)
shall be void.' "

You mentioned particularly checks drawn on the account, "Milton Carpenter, State Treasurer, Trustee of the Old Age and Survivors Insurance Contributions," which have been outstanding more than one year. It is our understanding that

Honorable Milton Carpenter

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in the past the statement concerning checks being void after one year has not been printed on such checks and checks drawn on other trust accounts.

This is to advise you that it is our opinion that the above-quoted provisions of Section 30.200 are not applicable to checks drawn on trust accounts. We do not deem it necessary to undertake a detailed discussion of the question, but it may be noted that moneys could not properly be transferred from the trust accounts to general revenue in accordance with other provisions of Section 30.200 governing checks which are outstanding more than one year.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

December 22, 1961



Honorable Jack L. Clay
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

This letter of advice is in lieu of a formal opinion in answer to the inquiry of your immediate predecessor forwarded on June 13, 1961, with respect to his authority under applicable statutes to prohibit the use of "good health" or "sound health" clauses in accident and health policy forms.

Before discussing Missouri's statutes particularly applicable to accident and sickness insurance policies it is necessary to take notice of the legal character of the insurance contract. At 44 C.J.S., Insurance, Sec. 223, we find the following text:

"A contract of insurance is a commercial or mercantile contract. While it has some features which distinguish it from an ordinary commercial contract, in general respects it is like any other contract and is governed by the same rules. Being a voluntary contract, as long as the terms and conditions made therefor are not unreasonable or in violation of legal rules and requirements, the parties may make it on such terms, and incorporate such provisions and conditions as they see fit to adopt."

In *Winters v. Reserve Loan Life Insurance Company*, 221 Mo. App. 519, the Kansas City Court of Appeals was construing the provisions of a life insurance contract and spoke as follows at 221 Mo. App. 519, 1.c. 524:

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"There is no evidence as to how the amount of the initial premium of \$1194.25 on the substituted policy was arrived at or what it was made up of. Of course it was quite immaterial as to how the amount was computed for the reason that the parties were at liberty to enter into any sort of a contract they desired without interference by the courts, except for fraud, mistake, or the like, or lack of consideration."

It is of interest to note that the Winters case, cited above, did have a "good health" clause in the insurance contract, though it was not in issue.

Judicial approval of "sound health" clauses in life insurance contracts is to be noted in the following language from *Kirk v. Metropolitan Life Insurance Company*, 336 Mo. 765, 1.c. 783, 784, 81 S.W. 2d 333:

"We think also that the Kern case correctly construes the statute as making no distinction between innocent and fraudulent misrepresentations, especially when the statute is applied to a sound health condition in the policy itself such as in the instant case. That stipulation is a part of the contract which the parties had a right to and did make. The insurer agreed to assume liability only upon condition that the insured should be, not merely believe herself to be, in sound health when the policy was issued, and the premium was fixed upon that basis."

Kirk v. Metropolitan Life Insurance Company, supra, is quoted approvingly in *Lipel v. General American Life Insurance Company*, 192 S.W. 2d 871.

With reference to the general rule that contracts of insurance are to be governed by the same rules as other contracts, the following language is cited from *Howard v. Aetna Life Insurance Company*, 346 Mo. 1062, 1.c. 1067, 145 S.W. 2d 113:

"Respondent cited a number of cases in support of its contention that contracts of insurance must be governed by the same rules as other contracts. That is fundamental law."

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In discussing the power of the Legislature as distinguished from the power of the Insurance Commissioner to prescribe a form of insurance contract to be written, the following language is not to be overlooked from *Nalley v. Home Insurance Company*, 250 Mo. 452, 1.c. 466:

"So that we repeat that there can be no question (owing to the intricacies of insurance contracts) that the Legislature can prescribe a form for such contracts to be used in this State, but in our judgment it cannot delegate this important task to either the Insurance Commissioner or to the insurance companies, or to both combined. If public policy demands that the public be protected in these contracts the police power is no doubt broad enough to authorize legislative action, but it yet remains a legislative duty, which cannot be delegated."

The case of *Nalley v. Home Insurance Company*, supra, decided in 1913, was followed by *Swinney v. Connecticut Fire Insurance Co.*, 8 S.W. 2d 1090, decided by the Springfield Court of Appeals in 1928. In this latter case the Court was discussing Section 6239 RSMo 1919, now found at Section 379.160 RSMo 1959, such statute being commonly referred to as the standard fire policy form law. That statute continues to provide that "said policy form may be approved by the insurance commissioner [superintendent of insurance] of this [the] state." With reference to said statute the Springfield Court of Appeals spoke as follows at 8 S.W. 2d 1090, 1.c. 1092:

"This standard form is recognized by our statutory law, and is required to be filed by all old line insurance companies doing business in this state with the state insurance commissioner and by him approved. Section 6239. In so far as this particular statute attempts to permit the insurance commissioner and insurance companies to write the terms of an insurance policy, it is unconstitutional and void."

Your authority, if any, to prohibit the inclusion of "sound health" or "good health" clauses in individual accident and health policy forms being used in Missouri must be found in Section 376.770 to 376.795 RSMo 1959, such statutes being titled "Uniform Individual Accident and Sickness Insurance Law," and

enacted by the 70th General Assembly of Missouri (Laws 1959, H.B. No. 252). The general power of the superintendent of insurance to approve policies under this law is found spelled out in language found at Paragraph 7 of Section 376.777 RSMo 1959, reading as follows:

"7. Approval of policies. No policy subject to sections 376.770 to 376.795 shall be delivered or issued for delivery to any person in this state unless such policy, including any rider, indorsement or other provisions, supplementary thereto, shall have been approved by the superintendent of insurance. The superintendent shall have authority to make such reasonable rules and regulations concerning the filing and submission of policies as are necessary, proper or advisable. Such rules and regulations shall provide, among other things, that if a policy form is disapproved, the reasons therefor shall be stated in writing; that a hearing shall be granted upon such disapproval, if so requested; and that the failure of the superintendent of insurance to take action approving or disapproving a submitted policy form within a stipulated time, not to exceed sixty days from the date of filing, shall be deemed an approval thereof until such time as the superintendent of insurance shall notify the submitting company, in writing, of his disapproval thereof. The superintendent of insurance shall approve only those policies which are in compliance with the insurance laws of this state and which contain such words, phraseology, conditions and provisions which are specific, certain and unambiguous and reasonably adequate to meet needed requirements for the protection of those insured." (Underscoring supplied)

The language first underscored in Paragraph 7 of Section 376.777, supra, limits the rule making power of the superintendent of insurance to those rules and regulations he may make pertaining to the "filing and submission" of policies, and cannot be construed as granting authority to the superintendent to order additional contract provisions to be placed in the policy, or to

Honorable Jack L. Clay

order contract provisions deleted. The second underscored portion of Paragraph 7 of Section 376.777, supra, places a duty upon the superintendent of insurance to approve only those policies which are in compliance with the laws of this state, and which contain "such words, phraseology, conditions and provisions which are specific, certain and unambiguous and reasonably adequate to meet needed requirements for the protection of those insured." The duty placed upon the superintendent of insurance by language just referred to, and appearing in Paragraph 7 of Section 376.777, supra, must be read in the light of all provisions found in the Uniform Individual Accident and Sickness Insurance Law (Secs. 376.770 to 376.795 RSMo 1959).

Without discussing in detail the matters required to be expressed in the policy by Section 376.755, and the specific provisions required in the policy by Section 376.777, it will suffice to say that nowhere in this law is there a reference made to inclusion or exclusion of "sound health" or "good health" clauses in policies, or applications which may become a part of such policies.

It is conceivable that a "good health" or "sound health" clause appearing in an application to become a part of an accident and health policy form subject to approval under authority found in Paragraph 7 of Section 376.777 RSMo 1959, may be so worded as to be not specific, uncertain, ambiguous, and not reasonably adequate for the protection of those insured, as such language is used in the statute.

In view of our analysis of the statute and case law related to this subject, as expressed in this letter, it is recommended that until such time as experience in the Division of Insurance has demonstrated that the use of "sound health" or "good health" clauses is working to the detriment of the insurance buying public you should place no obstacles in the way of the use of such clauses.

When experience has demonstrated that the use of "sound health" or "good health" clauses is not to the best interests of the insurance buying public, or that such clauses are on their very face manifestly ambiguous, uncertain and misleading, it is our thought it will then be appropriate for you to consider the advisability of recommending legislative action to correct the situation, or perhaps some other remedy.

Honorable Jack L. Clay

This office stands ready to construe any particular "sound health" or "good health" clause you find necessary to submit for examination.

Yours very truly,

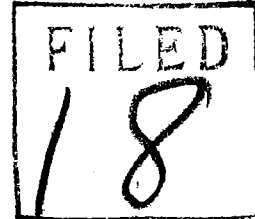
THOMAS F. EAGLETON
Attorney General

JLO'M:mn:mc

Nepotism:

Employment by County Judge on hourly or monthly basis of park employee who later marries relative of judge during period of his employment does not constitute violation of Article 7, Section 6 of Constitution 1945. Signing employee's payroll for service performed does not constitute an employment.

January 26, 1961



Honorable William A. Collet
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City 6, Missouri

Dear Mr. Collet:

This office is in receipt of your request dated January 16, 1961, for an official opinion as follows:

"I would deeply appreciate it if at your earliest convenience you would furnish me with an opinion as to whether the below listed state of facts constitute a violation of Article 7, Section 6, the anti-nepotism provision of the Missouri Constitution.

On May 25, 1959, one T. C. was employed by an order upon the affirmative vote and signature of one of the judges of the Jackson County, Court. At this time, T.C. resided with his parents in Johnson County, Kansas, and was betrothed to the daughter of this judge. On the first payroll record of the County Clerk his address was listed at the same address of the particular county judge which address is a single family address. The position for which T.C. was employed was that of a utility man in the Jackson County park. The monthly compensation varied and was based on the number of hours actually worked computed at an hourly rate. On June 6, 1959, approximately two weeks after the employment T. C. married the daughter of this judge and continued his position

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throughout the months of June, July, August and part of September. On each of these months subsequent to the marriage his compensation was based on an hourly rate and the payroll was signed by the particular county judge.

I am not unmindful of two prior opinions of your office holding that a subsequent marriage after the employment does not constitute a violation of the section. However, I noted that in each of these prior opinions, December 3, 1940, to Elmer A. Strom, October 5, 1933, to J. W. Van Ness dealt with school teachers whose employment was for a definite school term and not on an hourly or monthly basis as in the present case."

The constitutional provision presently applicable is contained in Article VII, Section 6 of the Constitution of Missouri 1945 which provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

As noted in your request there are two prior opinions of this office construing the similar provisions of Article XIV, Section 13 of the Constitution of 1875, as adopted February 26, 1924. These opinions hold that where, at the time of the naming or appointing, a teacher is not related within the fourth degree to a director who votes for her appointment, the subsequent marriage of such teacher to a relative of the director, does not result in a violation of the constitutional provision. It is the opinion of this office that these prior opinions are equally applicable to the present constitutional provision.

In the cases involved in the prior opinions the teachers were employed for a definite period of time whereas in the matter referred to in your question the employee was employed on an hourly or monthly basis and paid only for time actually worked. The question is whether such difference in facts impels a different conclusion.

It is our opinion that in either situation, the constitutional provision in question applies only when the person appointed is a relative within the fourth degree at the time such person is named or appointed to public office or employment. The fact that he may

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later become such relative by a voluntary act on his part cannot work a forfeiture of the office of the appointing official.

As we construe the question, the actual employment in which the Judge of the County Court participated was on May 25, 1959, and that there was no further act on such Judge's part, except as hereinafter noted, which related to such employment.

The general rule is that an indefinite employment at so much per month, per week, or per day, but without any definite term, is employment at will and that in such case either party may terminate the employment at any time. Forsyth v. Board of Trustees of Park College, 240 Mo. App. 622, 212 S.W. 2d 82, 85; Bell v. Faulkner, Mo. App. 75 S.W. 2d 612. In the Forsyth case, it was held, quoting from the earlier case of Brookfield v. Drury College, 139 Mo. App. 339, 1235 W. 86:

"The law in this state has been well stated that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will, and may be terminated by either party at any time.* * *"

However, until either party has in fact terminated the employment, such employment does not cease but continues even though the employee is paid only for time actually worked. See for example ACF. Industries, Inc. v. Industrial Commission, Mo. 320, S.W. 2d 484, where the Court had for consideration the effect of the employee having been "laid off." The Supreme Court stated the following:

"The term 'layoff,' in the field of employment, has a well-defined meaning. See Webster's New International Dictionary, 2nd Ed. It does not mean termination of employment, but rather does it mean: 'The act of laying off, esp. work or workmen; a period of being off or laid off work; a shutdown; a respite.* * *'"

"We hold that claimant, although laid off by appellant on November 2, 1956, remained an employee of appellant within the clear intentment and meaning of the contract until his discharge on January 11, 1956." (The Court meant January 11, 1957, and the figure "6" is clearly a typographical error).

The fact that in the instant case the payroll was signed by the Judge of the County Court who participated in the appointment and that he did so after the employee became related to him does

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not in the opinion of this office, constitute either the naming or appointment of such employee to a public office or employment. The employee was theretofore named or appointed, and by reason of having performed the services was entitled to his compensation.

CONCLUSION

It is the opinion of this office that a County Judge who names or appoints to public employment a person who at the time of such appointment is not related to him, does not forfeit his office by reason of the fact that subsequent to such appointment the employee becomes related to the County Judge and that such Judge signs the payroll. The fact that such employee is employed without a definite term on a monthly basis and paid only for time actually worked does not alter the conclusion.

The foregoing opinion, which I hereby approve, was prepared by my assistant Joseph Nessenfeld.

Yours very truly,

Thomas F. Eagleton
Attorney General

JN:jh

REPUTABLE PERSON: "Reputable person" to be surety on bond is
CRIMINAL LAW: one of good moral character. Specific acts
BONDS: may be shown in making such determination.
SUPREME COURT RULES:

February 15, 1961



Honorable William A. Collet
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City, Missouri

Dear Mr. Collet:

This is in answer to your letter of recent date requesting an official opinion of this office, and reading as follows:

"A question has arisen here concerning the proper interpretation of Supreme Court Rule 32.14 (Subsection 1) setting forth the qualifications for surety on bail bonds. This portion of the rule requires that the bondsman attempting to qualify must be 'A reputable person'. This phrase is not otherwise defined in any other place in the rules, and in any Missouri statute that we can find.

"It would be deeply appreciated if you would furnish us a workable definition of the term 'reputable person' and advise if this term is synonymous with 'a person of good moral character' and, if so, whether specific instances of criminal acts and other similar conduct can be shown, in any hearing which might be held in which the question is in issue."

Supreme Court Rule 32.14 provides as follows:

"An individual shall not be accepted as a surety on any bail bond taken under these Rules unless he possesses the following qualifications:

Honorable William A. Collet

1. He shall be a reputable person, at least twenty-one years of age and a bona fide resident of the State of Missouri.
2. He shall not have been convicted of any felony under the laws of any state or of the United States.
3. He shall not be an attorney-at-law, a peace officer, a constable or a deputy constable.
4. He shall not be an elected or appointed official or employee of the State of Missouri or any county or other political subdivision thereof.
5. He shall have no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States."

There is no definition by the Supreme Court of the meaning of the term "reputable person" as such term is used in Sub-section 1 of Rule 32.14. We believe that the meaning of such term is that found in the case of Foster v. Crisman, 144 NW 1021, decided by the Supreme Court of Iowa. In that case the Supreme Court of Iowa had under consideration the term "reputable person" within the meaning of a law requiring the statement of consent to the sale of intoxicants to be accompanied by an affidavit of some reputable person that he witnessed the signing of the statement. In discussing the meaning of such term the court said, 1.c. 1023:

" * * * In the Jackman Case, 137 N.W. 906, the words 'reputable person' were for the first time construed. It was there held that they are not equivalent to 'credible person,' and that the word 'reputable' is not confined to a matter of reputation, but that it implies to some degree a character which is worthy of good repute or entitled to the esteem and respect of good citizens generally.

"Another definition of reputable is:
'Having, or worthy of, good repute.'

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Webster's New International Dictionary. Another definition is: 'Not mean or disgraceful.' Century Dictionary. See, also, 34 Cyc. 1623.

"We think it has reference to a person's real character, as distinguished from reputation, as under the statute in regard to seduction, which provides, in substance, that, if a person seduce an unmarried woman of previously chaste character he shall be punished, etc. In such case it is held that it is her actual character in that respect, and not her reputation. Where the real character is the issue, it is competent to show specific acts in order to prove that the person does not possess such a character. * * *"

The court further said, l.c. 1024:

"A person not having a good moral character could not be held to be reputable. A bootlegger and gambler is not a person of good moral character entitled to citizenship under the laws of the United States. In re Trum (D.C.) 199 Fed. 361. See, also, Whissen v. Furth, 73 Ark. 366, 84 S.W. 500, 68 L.R.A. 161; Foster v. Police Commissioners, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; Ouachita County v. Rolland, 60 Ark. 516, 31 S.W. 144; Hardesty v. Hine, 135 Ind. 72, 34 N.E. 701; Groscop v. Rainier, 111 Ind. 361, 12 N.E. 694. In the foregoing cases the actual character was shown.

"It is not necessary, as contended by appellant, that there should be a conviction of, or plea of guilty by, the party attacked in order to show that he is not reputable."

Therefore, in determining who is a reputable person, a determination must be made as to the real character of such individual and specific acts of such person may be shown in making such determination.

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CONCLUSION

It is the opinion of this office that the meaning of the term "reputable person" as it is used in Supreme Court Rule 32.14 means a person of good moral character, and it is further the opinion of this office that specific acts may be shown to determine the real character of such person to determine whether or not he is a "reputable person."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

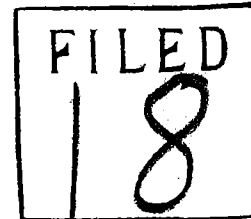
Very truly yours,

THOMAS F. EAGLETON
Attorney General

CEB:ml

- RAILROADS: (1) Railroad property is to be assessed only by the
TAXES: taxing units where the property is located.
(2) Only the taxing units for which railroad taxes
were levied and collected are entitled to the
taxes collected.

April 26, 1961



Honorable J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Colley:

In your letter of February 16, 1961, you submit the following question:

"We have the township organization in Dade County. In Ernest Township there is a special road district known as The Shannon Special Road District. This special road district comprises about 50% of the territory of Ernest Township. The Dade County Treasurer has mailed the Ernest Township board a check covering a proportionate part of the railroad taxes collected by Dade County. Actually there is no railroad tract through either Ernest Township or the Shannon Special Road District. The question I need answered, is whether or not the Shannon Special Road District is entitled to part of the railroad taxes?"

We have been informed by the State Tax Commission that the Commission has apportioned no distributable railroad property in Dade County to Ernest Township or to Shannon Special Road District and that no railroad property has been returned by local assessors from Ernest Township or Shannon Special Road District.

Chapter 151, RSMo 1959, provides for the taxation of railroads in the state. It is the exclusive method.

Section 151.020, RSMo 1959, requires a railroad company on or before May the first of each year to submit a statement under oath

Honorable J. W. Colley

to the State Tax Commission listing the total length of their road, including leased property, the entire length in the state and the length of such roads in each county, municipal township, city, incorporated town, special road district, library district, public water supply district, fire district or sewer districts in which tracks are located in the State, together with the rolling stock, depots, water tanks and turntables, and the actual cash value thereof.

Section 151.030, RSMo 1959, provides for a duplicate statement required in Section 151.020 also be filed with the county clerk.

Section 151.060, RSMo 1959, provides for the State Tax Commission to assess, adjust and equalize the aggregate valuation of the property.

Section 151.080, RSMo 1959, provides the State Tax Commission shall apportion the aggregate value of all such property of the railroad to each county, municipal township, city or town, special road districts, and other taxing units according to the ratio which the number of miles of such road in such taxing unit bears to the whole length of such road in this State.

Section 151.090, RSMo 1959, provides for the State Tax Commission to certify to its valuation. Said section provides in part:

"The certificate shall set forth the entire length of the railroad, including sidetracks, in the state, and the valuation thereof per mile; the total value of the rolling stock of the railroad; the total length of the roadbed, including sidetracks, in each county, municipal township, city or incorporated town, special road district, library district, school districts which levy taxes for library purposes pursuant to section 137.030, RSMo. public water supply, fire protection and sewer districts or subdivisions, except other school districts; also the total value of roadbed and sidetracks and rolling stock as assessed, adjusted, equalized, and apportioned to such county, municipal township, city or incorporated town, special road district, library district, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo., Public water supply, fire protection and sewer districts or subdivisions, except other school districts therein by the Commission."

Section 151.100 RSMo 1959, provides for the assessment of property belonging to the railroad which is not assessed by the State Tax Commission. This assessment is to be made by the proper

Honorable J. W. Colley

assessor of the county, city town or village where the property is located, but the taxes shall be levied and collected as other railroad taxes.

Section 151.120, RSMo 1959, provides in part that every city, incorporated town or village, special road district, library district, public water supply district and other taxing units wherein any railroad property is located, on or before the 10th day of August of each year to certify to the county court a statement of the assessments made under Section 151.100, and the rate per cent levied by the city, town, village, special road district, and other taxing unit. (Section 137.600 regarding Township Road Taxes).

Section 151.140 RSMo 1959, provides in part that -- the county court, upon receipt from the State Tax Commission, of the returns of the county assessor and the certificates of cities, towns, villages, special road districts, library districts, and other taxing units, therein named, shall ascertain and levy the taxes for state, county, municipal township, city, town and village, special road, library, public water supply and other taxing units therein named, on the railroad and the property thereof in such county, municipal township, city, town or village, special road district, and other taxing units therein named, at the same rate as may be levied on other property and shall make an entry thereof on the records of the court.

Section 151.170, RSMo 1959, provides:

"Within ten days after the county court has levied the taxes on railroad property, as prescribed in sections 151.140 and 151.150, the county clerk of the county shall extend the same on a separate tax book, to be known as 'the railroad tax book', in which he shall place, first, the total valuation of the roadbed and rolling stock of each railroad company, as assessed, equalized and apportioned to the county by the state tax commission, with the amount of state, county, municipal township, city, incorporated town and village, school, special road, library, public water supply, fire protection and sewer purposes and taxes for the erection of public buildings and for other purposes, levied thereon by the county court, stated separately; second, a description of each tract of land, town lot, or other real estate, including the machine and workshops and other buildings in numerical order, and tangible personal property, as returned by local

Honorable J. W. Colley

assessors, and the amount of state, county, municipal, city, town or village school taxes, and taxes for the erection of public buildings, and for other purposes, levied thereon, stating each separately, and crediting school taxes and taxes for the erection of public buildings, and for other purposes, to the proper district or municipality.

Section 151.180, RSMo 1959, provides for the county collector to collect and disburse the taxes to each taxing unit.

Section 151.190, RSMo 1959, provides:

"It shall be the duty of the county clerk as soon as said tax book is completed, to make out and certify to the secretary of the proper railroad company, or the officer making the return thereof, a statement of taxes levied on the property of such railroad company in his county, which statement shall contain.

(1) The total valuation of roadbed and rolling stock as the same was assessed, equalized and apportioned to such county, and the amount of state, county, city, town or village, municipal township, special road districts, library districts, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo., public water supply, fire protection and sewer districts or subdivisions and school taxes and taxes for the erection of public buildings, and for other purposes levied thereon;

(2) The total valuation, as shown by the returns of the local assessors, of all property in such county belonging to such railroad company, whether real property, or tangible personal property, including lands, warehouses, shops and other buildings, and the amount of state, county, city, town, village, special road districts, library districts, school districts which levy taxes for library purposes pursuant to section 137.030, RSMo. public water supply, fire protection and sewer districts for subdivisions; school taxes and taxes for the erection of public buildings and for other purposes levied thereon."

It is apparent from reading Chapter 151, RSMo 1959, that the only method for taxing railroads is as provided in said chapter. That the railroad property is to be assessed and taxes levied on

Honorable J. W. Colley

the property in behalf of the taxing units mentioned in Sections 151.020 and 151.100 only in such taxing units through which the road passes or its property located. It is equally clear that under Section 151.140, supra, that it is the duty of the county court to ascertain and levy taxes due each taxing unit separately as shown by the report filed by the state tax commission and the certificate filed by the cities, towns, villages, special road districts and other taxing units as provided therein. Under Section 151.170, supra, it is the duty of the county clerk after the county court has levied the taxes, to enter the taxes in a separate tax book known as "the railroad tax book", in which he shall place, first, the total valuation of the roadbed and rolling stock as assessed, equalized and apportioned to the county by the state tax commission, with the amount of state, county, municipal township, city, town or village, school, special road and the other taxing units mentioned in said statute, as levied thereon by the county court, with the amount due each stated separately. The other property belonging to the railroad not assessed by the state tax commission and which is assessed as provided in Section 151.100, supra, is likewise to be entered in "the railroad tax books, separately as to each taxing unit as assessed with the amount due each, which book is then delivered to the county collector. Under Section 151.180, supra, it is the duty of the county collector to collect the total amount of taxes in each of the several funds as shown on the tax book delivered to him by the county clerk.

CONCLUSION

In answer to the question you submit it is our opinion that a township or special road district in which there are no railroad tracks and in which there is no property of a railroad cannot levy taxes against railroad property, and no taxes can be collected from the railroad for such township or special road district. If no taxes were levied or collected for a municipal township or special road district, then said township and road district would not be entitled to share in the taxes collected for the other taxing units.

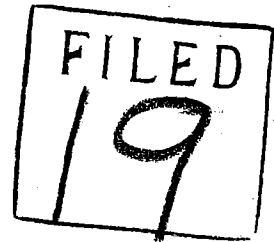
This opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:BY

July 5, 1961



Honorable Cornelius Costello
County Counselor
Jackson County Court House
Kansas City, Missouri

Dear Mr. Costello:

This letter of advice is in lieu of a formal opinion requested in your letter of April 14, 1961, in which you submitted a factual background against which you posed the following questions:

"Under Sections 229.040 and 229.050:

"1. May the Court employ contractors for such work?

"2. May the Court employ necessary help and day labor to do such work?

"3. May the County Court accept donations of labor and materials and then employ laborers or contractors to complete said improvements?

"4. May the County Court employ competent engineers to aid and assist the county highway engineer in the supervision and inspection of highways?

"5. May the County Court contract with and employ competent engineers to supervise and direct such work?

"6. May the County Court employ competent engineers to prepare plans, specifications and costs for work to be done and let by contract?

Honorable Cornelius Costello

"7. May the County Court employ competent engineers to prepare plans, specifications, costs, etc., for work to be done by county employees?

"8. If the County Court can employ other competent engineers - may they perform the duties and execute the reports as provided in Section 229.070 and perform the duties under Sections 229.040 and 229.050?

"9. May the County Court advertise the letting of contracts as provided in Section 229.050, if the County Highway Engineer refuses to so do after the plans have been approved?

"10. May the County Court employ other personnel without the approval of the Sewer Engineer in the construction and maintenance of sewers under Chapters 249 and 250 RSMo. 1959?

"11. May the County Court issue permits to applicants who have complied with the Code and regulations under Section 249.560, upon the refusal of the Sewer Engineer to so do?

"12. May the County Court, upon the failure or neglect of the County Highway Engineer, to appear before it when so ordered, compel his attendance, for the purpose of inquiring into and promoting plans for the road program?

"13. If the County Court does not have the power to contract for, or with, other competent engineers to either perform, or assist the county Highway Engineer, or if the County Highway Engineer fails or neglects, or refuses to perform his duties, when so ordered by the County Court, what remedies does it have, and what procedural steps should be taken by the County Court?"

Before commenting in relation to the thirteen questions you have posed, we establish the fact that the office of county highway engineer and surveyor in Jackson County, a county of the First Class, is an elective public office, as evidenced by the following language from Section 61.010 RSMo 1959:

Honorable Cornelius Costello

"In all counties of class one in this state there is hereby created the office of county highway engineer and surveyor, to be known and designated as 'highway engineer', who shall be the chief officer in such county in all matters pertaining to highways, roads, bridges, culverts and surveys. At the general election in the year 1948, and every four years thereafter, the qualified voters of each such county shall elect a highway engineer, who shall hold his office for four years and until his successor is elected, commissioned and qualified." (Underscoring supplied)

At this point we preface further remarks by adopting a statement of law in relation to all public officers as found in the following language from State ex rel. Thrash v. Lamb, 237 Mo. 437, 1.c. 451, 141 S.W. 665:

"The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers."

Notice must be taken of the condition of the official bond required to be given by the highway engineer in Jackson County and as spelled out in the following language from Section 61.040 RSMo 1959:

"* * * The condition of such bond shall be that the said highway engineer will faithfully perform and discharge all the duties of the office of highway engineer, and that he will keep and carefully preserve all books, records, surveys, plats, plans and other papers pertaining to his office, required by law to be kept by the highway engineer or the county surveyor, and that he will account for and deliver the same, together with all tools, machinery, material and equipment to which he has come into possession by reason of his office, to his successor in office. * * *"

Authority to employ technical and professional help and assistants is given to the county highway engineer in Jackson County in the following language from Section 61.060 RSMo 1959:

Honorable Cornelius Costello

"The county highway engineer is authorized to employ such technical and professional help and assistants at such salaries or under such terms as may be approved by the county court. Payments to other help necessary in construction, reconstruction, maintenance and repair of public highways, roads, bridges, and culverts, or necessary in executing surveys as surveyor may be either on a monthly or daily basis."

Section 61.060, quoted supra, vests in the county highway engineer the authority to employ technical and professional help and assistants, but the salaries and terms of employment of such persons must be approved by the county court.

Section 61.070 RSMo 1959 treats of supervisory duties of the Jackson County highway engineer in the following language:

"The highway engineer shall have direct supervision over the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts in the county. The expenditure of all county road and bridge funds, special or otherwise, shall be approved by the county court. The county court shall not order a road established, changed or vacated until said proposed establishment, change or vacation has been examined and approved by the highway engineer in a written report filed with the county court; provided, however, that if the highway engineer shall not have filed a written report on such proposal within thirty days after being notified thereof by the county court, the court may proceed to make any orders respecting such proposal without such report."

Section 61.070, quoted supra, leaves no doubt concerning the sole authority and responsibility of the county highway engineer in Jackson County for directly supervising the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts in the county. This statute clearly states that the expenditure of all county road and bridge funds, special or otherwise, shall be approved by the county court. This power of approval of expenditures should not be construed as authorizing the county court to designate in the first instance what expenditures are to be planned by the county highway engineer. This observation just made is further strengthened by the following provision found in this Section 61.070 RSMo 1959:

Honorable Cornelius Costello

"* * * The county court shall not order a road established, changed or vacated until said proposed establishment, change or vacation has been examined and approved by the highway engineer in a written report filed with the county court; provided, however, that if the highway engineer shall not have filed a written report on such proposal within thirty days after being notified thereof by the county court, the court may proceed to make any orders respecting such proposal without such report." (Underscoring supplied)

To emphasize the mandatory nature of language underscored in Section 61.070, supra, reference is made to the case of *Morris v. Karr*, 342 Mo. 179, 114 S.W. 2d 962, where the Supreme Court of Missouri was construing the following language from Section 8013 RSMo 1929, applicable to counties of classes 2, 3 and 4:

"No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer."

In ruling that the foregoing language in Section 8013 RSMo 1939 was mandatory the Supreme Court spoke as follows at 342 Mo. 179, 1.c. 184, quoting from *State ex rel. Tummons v. Cox* 313 Mo. 672, 282 S.W. 694:

"It is our conclusion that Section 10789 (R.S.Mo. 1919, now Sec 8013, R.S.Mo. 1929) makes it mandatory that the proposed change or vacation asked for by petitioners in the cause at bar be "examined and approved" by the highway engineer before the county court has any lawful right or jurisdiction to make the order vacating the road. We see no escape from this conclusion."

Section 8013 R.S.Mo. 1929 was repealed and reenacted in 1957 (L. 1957, p. 324) and is now found at Section 61.220 RSMo 1959 without the clause quoted above and discussed in *Morris v. Karr*, supra, but the revisor's note now appearing under Section 61.220 RSMo 1959 discloses that the clause "was removed from this section in 1957 because duplicating a like provision in section 228.070 RSMo," 1959. The proviso found in Section 61.070 RSMo 1959 guards against inaction of the county highway engineer by providing a reasonable period of thirty days for the county highway engineer to make a written report of his approval or disapproval of any proposed order of the county court to establish, change or vacate a road.

Honorable Cornelius Costello

Consequently, under this Section 61.070 RSMo 1959, we find that the county court may order the establishment, change or vacation of a road only when such action is approved by the county highway engineer, or when he neglects to make a written report as required by the statute. This procedure has commendable basis when we view the qualifications required of the county highway engineer under Section 61.030 RSMo 1959, reading as follows:

"Such highway engineer shall be a resident of the state of Missouri, skilled and experienced in general road, bridge and culvert work, and authorized to practice engineering under the laws of this state providing for and requiring the registration of professional engineers. He shall be active and diligent in the discharge of his duties and personally attend to them. He shall maintain an office at the county seat of the county, and where such county has a courthouse in another city or town, shall also maintain an office therein, all to be provided to him at the expense of the county."

Section 61.080 RSMo 1959 imposes upon the highway engineer duties of inspection, investigation, adjustment and repair of the condition of all public highways, roads, bridges and culverts in the county. Under this statute the county court can order the county highway engineer to investigate a condition of disrepair of any road or highway or of a dangerous or unsafe condition of any highway, road, bridge or culvert in the county, or of the neglect of any contractor performing any work of any character on any public highways, roads, bridges and culverts, and it becomes the duty of the highway engineer to make such investigation and report back to the county court and make such adjustment, repairs or corrections as may be necessary and to make a written record or report of the final disposition of the matter to the county court. The limited scope of the order of the county court which may be directed to the county highway engineer is apparent on the face of the statute, Section 61.080 RSMo 1959.

The yearly report of the county highway engineer required by Section 61.100 RSMo 1959 to be made to the county court during the month of January is mandatory and, so far as the ensuing year is concerned, requires that the highway engineer:

"* * * estimate balances, revenue and receipts creditable to any county road and bridge fund, special or otherwise, and
* * * submit for approval by the court a plan for construction, reconstruction,

Honorable Cornelius Costello

maintenance and repair of existing established public highways, roads, bridges and culverts proposed to be undertaken and completed during the current year.
(Underscoring supplied)

Section 61.100 RSMo 1959 also contains a final directive in the following mandatory language:

"* * *The highway engineer shall file such other reports from time to time as he may deem necessary or as requested by the county court." (Underscoring supplied)

It is noted at page 3 of your request for an opinion that the annual report called for by Section 61.100 RSMo 1959 was "filed on last day provided by law," and included a list of projects from which the county court could select projects "according to the necessity and amount of money that will be available for the 1961 program." Complaint is made that such annual report did not include "plans or specifications for any of the projects" listed in the report. Section 61.100 RSMo 1959, when directing that the highway engineer's report submit "a plan for construction, reconstruction, maintenance and repair of existing established public highways, roads, bridges and culverts proposed to be undertaken and completed during the current year" does not descend into detail or state that the "plan" is to include "plans or specifications" in relation to any one or more projects contemplated in the over-all plan.

We do know from your inquiry, as disclosed at page 2 thereof, that the highway engineer's plan, as submitted, did anticipate King Road projects totaling \$225,000.00, and twenty-two Pay-as-you-Go, contract projects to cost \$950,000.00. In view of the language of Section 61.100 RSMo 1959, we cannot say that the plan submitted in the highway engineer's report is deficient. However, in view of the responsibility placed upon the county court by Section 61.070 RSMo 1959, to approve "the expenditure of all county road and bridge funds, special or otherwise," and in view of the mandatory duty placed upon the highway engineer by Section 61.100 RSMo 1959 to "file such other reports from time to time * * * as requested by the county court," it may reasonably be concluded that the county court may request the county highway engineer to report specifically on plans and specifications touching those projects which will be undertaken in the current year as disclosed in his yearly report filed as required by Section 61.100 RSMo 1959. Only by such procedure will the county court be able to intelligently perform its duties required

Honorable Cornelius Costello

by Section 61.070 RSMo 1959. In the event the highway engineer refuses or neglects to make such additional reports upon a proper request, we then must search out alternative procedures to be employed by the county court.

Attention is directed to Section 229.040 RSMo 1959, a general statute directed to the construction of all public roads and provides that all such work shall be done under the supervision and direction of the county highway engineer. We here quote the proviso of such statute in its entirety:

"* * *; provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

While the above quoted proviso from Section 229.040 RSMo 1959 places supervisory jurisdiction over road construction in the county highway engineer, we also find in such proviso authority placed in the county court to employ "some other competent engineer." Aside from the importance of such proviso, we find, at paragraph 1 of Section 229.040 RSMo 1959, authority vested in the county court in the following language:

"1. Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and to do such work by day labor."
(Underscoring supplied)

Thus it seems that in the event the county highway engineer of Jackson County fails, refuses, neglects, or is unable to perform his statutory duties in relation to the orderly and timely construction and maintenance of county roads in Jackson County,

Honorable Cornelius Costello

then the county court has the authority to employ necessary professional and other labor deemed essential to accomplish the task. This conclusion is supported by the following language found in *Everett v. County of Clinton, Mo.*, 282 S.W. 2d 30, 1.c. 37:

"While it is true that the law is strict in limiting the authority of county courts, 'it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated and indispensable to their performance may be exercised.' *Blades v. Hawkins, supra*, 240 Mo. 187, 197, 112 S.W. 979, 982."

Of course, in view of the specific statutory authority granted to the highway engineer, he must be afforded ample opportunity and sufficient means to comply with and fulfill his statutorily imposed obligations.

This general letter of advice in relation to the problems outlined in your letter on April 14, 1961, must suffice for the present. It is apparent that a controversy exists between the county court and the county highway engineer, but this office is not fully informed respecting the merits of both sides of the controversy, nor the full reasons why it is alleged that the highway engineer is refusing to cooperate with the county court. In this letter we have outlined the powers of the county highway engineer particularly applicable to him as a duly elected county officer. We have also discussed the general powers vested in the county court in relation to the construction, maintenance, and repair of county roads. Such principles of law must be applied to the existing facts and this office is not in a position to state categorically that the county court may or may not do this or that, or that the county highway engineer may or may not do what he has done, because there is a lack of authoritative court decisions dealing with these particular or analagous statutes. It appears to us that if the highway engineer and the county court cannot effectuate an understanding within the framework of their respective statutory duties, then in such event the only way to settle the issues in controversy would be by a court decision.

We hope that the foregoing information and discussion of our views regarding the various statutes will be of aid and

Honorable Cornelius Costello

assistance to you in the solution of the problems which exist.
This letter was prepared by Julian L. O'Malley, Assistant
Attorney General.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

By

J. Gordon Siddens
Assistant Attorney General

JLO'N:aa

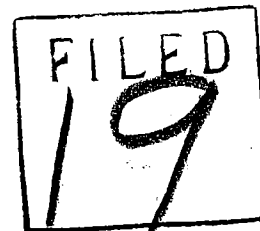
TAXATION:

Standing timber conveyed by a timber deed is real estate and may be separately assessed to the grantee, but such separate assessment is not mandatory.

REAL PROPERTY:

TIMBER INTERESTS:

July 7, 1961



Honorable Roy G. Cooper
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Cooper:

We have your request for an opinion concerning the assessment of standing timber as follows:

"In Madison County, Missouri, we have a great number of instances where the owner of land sells by deed or contract all the standing timber on his property and gives the purchaser usually one to five years to cut and remove the timber. The County Assessor desires to know whether or not he should assess the value of the timber sold by deed or contract to the purchaser as personal property, or whether the value thereof should remain with the owner of the land as real property assessment.

"For example: Last year Mine La Motte Corporation conveyed to Potosi Tie and Lumber Co., a corporation, by an instrument entitled, 'Timber Deed', all the standing timber on 700 acres of land for \$8,000.00. The purchaser is permitted five years to cut and remove this timber. Let us assume that as of January 1, 1961, that although part of the timber had been cut and severed from the real estate, that none owned by the Potosi Tie and Lumber Co., was physically within the boundaries of Madison County, and that the majority of this timber

Honorable Roy G. Cooper

is still growing and has not been severed from the real estate. The only severance that could be argued to exist would be a severance by virtue of the delivery of a timber deed.

"My question is: Can the standing timber which has not been physically severed from the real estate be assessed as personal property to the purchaser of the timber under a timber deed or contract?"

By letter dated May 23, 1961, enclosing photostatic copies of the timber deed to Potosi Tie and Lumber Company, grantee, your request was limited to an opinion upon the assessment of the standing timber described in said instrument. The timber deed dated January 8, 1960, in consideration of \$19,000, grants, bargains, sells, conveys, and confirms to Potosi Tie and Lumber Company, its successors and assigns, all the standing timber 12 inches in diameter and larger measured one foot from the ground on the high side, then growing on the land described therein. The grantee was granted a period of five years in which to cut, make, saw, and remove said timber from said land. The deed was duly recorded.

Section 137.075, RSMo 1959, provides as follows:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Section 137.010, RSMo 1959, contains the following definitions of real property and tangible personal property as such terms are used in the tax statutes:

"(1) 'Intangible personal property', for the purpose of taxation, shall include all property other than real property and tangible personal property, as defined by this section;

"(2) 'Real Property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto;"

Honorable Roy G. Cooper

A number of cases in Missouri have considered the question of whether standing timber is real or personal property, although none of such cases involved the assessment of taxes. In *Gibson v. St. Joseph Lead Company*, 232 Mo. App. 234, 102 SW2d 152, 1.c. 156, the court stated:

"The general holding of the courts in all jurisdictions is to the effect that standing trees are a part of the real estate as much so as the soil itself, and being a part of the real estate the title to same may be conveyed only in accord with the statute providing for the conveyance of real estate which is ordinarily by deed."

In *Mine LaMotte Lead & Smelting Co. v. White*, 106 Mo. App. 222, 80 SW 356, the rule was stated in this manner:

"The law in this state is that growing trees are part of the realty, and that the title to them lies in grant, and must be transferred by the formalities essential to a conveyance of land."

In *Potter v. Everett*, 40 Mo. App. 152, 1.c. 161, the court stated:

"But whatever may be the law elsewhere, it seems to be held in this state that growing trees standing on land are a part of the realty, and that title to them, while so standing, can be passed and acquired only by a statutory deed."

In *Cooley v. Kansas City P. & G.R.Co.*, 149 Mo. 487, 51 SW 101, 1.c. 103, it was said:

"The trees, while standing on the land are a part of it and the title to them could neither be sold nor reserved, except by statutory deed. (citing cases). The reservation was an interest in the land."

To the same effect is *Starks v. Garver Lumber Mfg. Co.*, 182 Mo. App. 241, 167 SW 1198.

In Deland v. Vanstone, 20 Mo. App. 297, the court made the following pertinent observation:

"We have not been able to find any case where timber standing upon land has been treated or considered as personal property."

It is therefore the opinion of this office that the standing timber conveyed by the deed in question is real estate, and may not be assessed as personal property.

The further question as to whether standing timber must be separately assessed is inherently involved in the question you have asked of this office.

The recent decision of our Supreme Court en banc in Dorman v. Minnich, 336 S.W. 2d 500, is relevant. That case involved mineral rights (which the court held came within the statutory definition of real estate), but in our view the ruling is equally applicable to the ownership of standing timber. There had been a severance of the ownership of the surface fee from the mineral estate, but neither the surface fee nor the mineral estate had been returned for assessment and collection of taxes, and the county assessor simply assessed the tract by legal description.

The pertinent rule of law as stated by the court at l.c. 506 is as follows:

"Further, we find no statute of this state that requires the separate assessment of the surface fee from the mineral estate where there has been a severance, nor should such separate assessment be required by the court where no such severed estates or interests have been returned by anyone for assessment. * * *"

The court did not rule the question of whether the two estates should have been separately taxed, stating, l.c. 506:

"* * * But whether the mineral estate may be separately taxed as real estate is not our problem since there was no separate assessment of either of the severed estates. The assessment here was by the legal description of the 20-acre tract and prima facie covered both estates. * * *"

Honorable Roy G. Cooper

The court ruled that in the circumstances of the case, a tax deed conveyed both the surface and mineral rights in the property, stating that a review of the statutes with reference to the assessment and levy of taxes on real estate "clearly shows that the legislative plan for the assessment and collection of taxes is based upon surface descriptions of real estate."

It should be noted further that Section 137.170, RSMo 1959, expressly provides that each tract of land shall be chargeable with its own taxes, no matter who is the owner, or in whose name it is or was assessed. Nevertheless, although the Dorman case holds that there is no mandatory requirement that the respective estates be separately assessed, particularly where they have not been returned by the respective owners for assessment, it is our view that when the assessor is fully aware of the separate estates, it would be proper to make separate assessments. It is to be noted in this connection that on several occasions our Supreme Court has sustained the validity of separate assessments of leasehold interests in real estate. See State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S.W. 998 and State ex rel. Benson v. Personnel Housing, Inc., 300 S.W. 2d 506.

CONCLUSION

It is therefore the opinion of this office:

1. Standing timber conveyed by a timber deed is real estate prior to its severance and may not be assessed as personal property.
2. Separate assessment of the timber interest to the grantee of the timber deed is proper.
3. Where the separate interests in the land have not been returned by the respective owners, separate assessments are not required.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

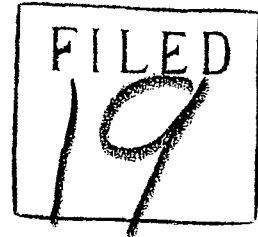
Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:aa

Opinion Request No. 137
answered by letter.

July 17, 1961



Honorable Roy G. Cooper
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Cooper:

It is our belief that your first two questions are answered by an official opinion of this office rendered under date of December 16, 1955, to Rex Henson. (We are attaching a copy of said opinion for your consideration.) This opinion holds that in probate and insanity hearings the costs of the proceedings (an attorney fee is one of such costs) are to be paid by the county, if the estate of the subject is insufficient, etc.

We believe that the question of the prosecuting attorney representing the alleged insane person is answered by an official opinion rendered under date of January 7, 1952, to Roy W. McGhee, Jr., a copy of which we are attaching.

Insofar as the representation of the alleged insane person by a law partner of a prosecuting attorney, we believe that the applicable principle of law is set out in an official opinion rendered under date of May 11, 1951, to O. C. Tee, which holds that a prosecuting attorney should not appear as defense counsel for a person charged with a crime outside his county because it would be contrary to public policy. Under the same reasoning, we believe that it would be against public policy for a partner of the prosecuting attorney to represent the alleged insane person, since the prosecutor should be representing the state and county at the hearing.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:gm
Enclosures

GENERAL ROAD DISTRICTS:
ROAD DISTRICTS:
COUNTY BUDGET LAW:
ROAD AND BRIDGE FUND:

All funds derived from both the first and second additional road levies in general road districts must be budgeted and may be spent only from class 3 of the budget in class 3 counties; the funds from the second additional road levy in several such general road districts may not be consolidated, but must be earmarked to the credit of each such district and may be expended only on roads or for the payment of protested warrants resulting from expenditure for roads within said district; county treasurer incurs no liability by paying or protesting warrants issued in accord with the budget estimate filed with him.

August 1, 1961



Honorable James E. Conway
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Mr. Conway:

You have requested an opinion from this office on four questions which are based upon the following facts set forth in your letter:

"This County has a number of Special Road Districts which, for the purpose of this opinion, we may assume to be properly organized and existing. We also have a number of "General or Common" Road Districts, that is to say, areas outside the Special Road Districts.

"Our problem relates to the Common Road Districts. The area outside of Special Districts has been divided into Road Districts. (See 231.010). The County has assessed a 35¢ levy in each of these road districts and some of the districts have voted an additional 35¢ levy. (See Mo. Constitution, Article 10, Section 12B, 137.555 and 137.565).

"In dividing the tax revenue raised by the aforementioned levies, the County Court has treated the income from Special Road Districts and Common Road Districts in a similar manner, in regard to the budget. The County has allocated 20% of the first 35¢ of the revenue raised by both Common and Special Districts for class 3 of the budget. The remainder of the funds

Honorable James E. Conway

of the Common Districts have been held by the Treasurer to the account of the particular road district and spent on warrant of the County Court drawn against the fund of the particular common district. No budget was ever filed by the common districts and the warrants so drawn were not counted as coming from class 3 or any other budgeted figure.

"A number of our "Common or General" Road districts have assessed the additional 35¢ levies. (See 137.565)."

Your first question is stated as follows:

"1. Should the first 35¢ levy of the Common or General District all be budgeted and spent from class 3 of the budget?"

It is our opinion that all of the tax collected from said first thirty-five cent additional levy derived from property in common or general districts should be budgeted and spent from class three of the budget.

Section 137.555, RSMo 1959, which implements Article X, Section 12A of the Constitution, provides for the levy of an additional tax not exceeding thirty-five cents, all of which shall be collected and turned into the county treasury where it shall be known and designated as "The Special Road and Bridge Fund," to be used for road and bridge purposes only. Said section provides that such part of said tax which shall arise from and be collected and paid upon any property within any special road district shall be paid into the county treasury and four-fifths thereof shall be placed to the credit of such special road district and paid out to such special road district upon warrants of the county court in favor of the commissioner or treasurer of the district. Said section further provides that the part of special road and bridge tax arising and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may in the discretion of the county court, be used in improving or repairing any county street or any incorporated city or village in the county if said street shall form a part of a continuous highway of said county leading through such city or village.

We believe that the clear meaning of this statute is that the entire portion of the first additional levy which is received from property in the common or general road districts together with

Honorable James E. Conway

one-fifth of that portion of the levy received from property within special road districts must all be budgeted and spent from class three of the budget.

Section 50.680, RSMo 1959, applicable to your county (third class), provides with respect to class three of the budget that the county court shall set aside and apportion the amount required for roads and bridges on other than state highways and not in any special road district, and that the funds set aside and apportioned for said class shall be made from the anticipated revenue to be derived from the levies made under Section 137.555. There is no statutory authority whatsoever which justifies taking only 20 per cent of the revenue derived from property in the general districts for class three expenditures, nor is there any authority to expend the proceeds of said levy other than from class three of the budget. The very purpose of such classification is to first determine the amount of anticipated revenue applicable to such purposes and then provide for its expenditure.

Summarizing, we are of the opinion that all of such funds derived from the first additional levy received from property not in any special road district must be budgeted and may be spent only from class three of the budget.

Your second question is stated as follows:

"2. Should the second 35¢ assessed in some common or general districts all be budgeted and spent through class 3 of the budget without special accounts being kept as to the particular district? If this expenditure is not made through Class 3, how is it handled?"

The county budget law, above referred to, provides that the county court shall prepare the budget for the county. We find no provisions in the statutes for a budget to be prepared and filed by a general road district, nor would there be any procedure whereby such a budget could be so filed. As above stated, Section 50.680, RSMo 1959, provides with respect to class three of the budget that the funds set aside and apportioned in said class shall be made from anticipated revenue to be derived from the levies made under Section 137.555, RSMo. It is to be noted that Section 137.555 provides that "in addition to other levies authorized by law", the county court may levy an additional tax of thirty-five cents. The use of the word "levies" in the plural evidences the intent to include within class three revenue which is derived not merely from the first additional thirty-five cent tax but also from any other levy "authorized by law" referred to in Section 137.555. Hence we are of the opinion that the funds derived from the second thirty-five cents levy must necessarily

Honorable James E. Conway

be budgeted and spent only from class three of the budget.

Section 12A of Article X of the Constitution specifically provides that the second thirty-five cent levy which the voters of a general road district have authorized shall be "placed to the credit of the road district authorizing such levy." This necessarily means that the revenue derived from such second thirty-five cent levy must be earmarked and held to the credit of the particular general road district which authorized such levy and, as above stated, may be spent only on roads within such general road district.

Your third question is stated as follows:

"3. The County Treasurer has in his hands funds from a number of common districts; on his books these funds have been kept separate. May he properly consolidate the funds and treat them all as class 3 funds and pay protested class 3 warrants therefrom?"

In view of the foregoing, it is our opinion that the county treasurer may not consolidate the funds derived from the second additional thirty-five cent levy authorized by the voters in several general road districts. The constitutional provision above referred to expressly requires that such funds shall be placed to the credit of the road district authorizing such levy. In our opinion this would preclude consolidating the funds derived from taxpayers in one general road district with those derived from another. That is to say, even though all of such funds are class three funds they may be expended for class three purposes only on roads within the particular general district which authorized such second additional levy. It follows that such funds may not be expended for the purpose of paying protested class three warrants unless such warrants resulted from expenditures made for roads in the particular general road district which authorized the levy. Of course, the revenue derived from the first additional levy constitutes but one fund and may be expended without regard to the limitations applicable only to the second additional levy.

Your fourth question is stated as follows:

"4. The County Treasurer is of the opinion that he is liable if he allows the County Court to exceed his estimate of anticipated revenue in class 3. (\$30,000.00 in this case). The County Court has budgeted something in excess of \$50,000.00. Is the County Treasurer liable for allowing the County Court to exceed what he anticipates the

Honorable James E. Conway

budget to be or may the Court properly spend according to the budgeted figure, even if it is in excess of what the Treasurer believes the revenue will be?"

It is our opinion that there is no liability on the part of the treasurer for allowing the county court to exceed what such county treasurer anticipates will be the revenue applicable to class three of the budget. The county budget law grants no authority to the county treasurer to make any personal estimates. Section 50.700, RSMo 1959, provides that the county clerk shall make an estimate of the various sources of revenue and deduct ten per cent thereof for delinquent taxes to get the net amount estimated for the purposes of budget. It is provided that the county court must balance its estimated budget for the year for the first five classes (of which, of course, class three is one) on such net estimate. Section 50.710 provides that the court shall show the estimated expenditures for the year by the various classes. Section 50.740, RSMo 1959, provides that it is the first duty of the county court at its regular February term to go over the estimates and revise and amend the same so as to permit efficiency and economy. It is further provided that at such time the court may alter or change any estimate as public interest may require and to balance the budget, but shall have no power to reduce the amounts required to be set aside for classes one and three "below that provided for herein". Said section provides that the county clerk shall file a certified copy of the budget estimate with the county treasurer within five days after it has been approved by the court and provides that the county treasurer shall not pay or enter any protest on any warrant for the current year until such budget estimate shall have been so filed.

As will be noticed, the county treasurer has no duty to perform with respect to estimating the amount of anticipated revenue and there is no liability on his part by reason of paying or protesting any warrants issued in accord with said budget estimate.

CONCLUSION

It is the opinion of this office that in a county of the third class -

1. All of the funds derived from the first additional levy for road purposes which is received from property not in any special road district must be budgeted and may be spent only from class three of the budget.

2. The funds derived from the second additional levy must be budgeted and spent only from class three of the budget, but must be earmarked to the credit of the particular general road district which authorized the levy and may be expended only on roads within such district.

Honorable James E. Conway

3. The county treasurer may not consolidate funds derived from the second additional levy authorized by the respective voters in several general road districts and such funds may not be expended to pay protested class three warrants unless such warrants resulted from expenditures made for roads in the particular road district which authorized such levy.

4. The county treasurer has no duty to perform with respect to estimating the amount of anticipated revenue and there is no liability on his part by reason of paying or protesting any warrants issued in accord with the budget estimate filed with such county treasurer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

COUNTY HEALTH CENTERS:
COUNTY COURTS:
HEALTH CENTER BUDGET:

County health center in county of fourth class has no power, as such, to borrow money. County courts of such county, upon request of board of health center trustees, may in its discretion issue tax anticipation notes payable out of the health center fund. Board of health center trustees may incur indebtedness and issue duly authenticated vouchers therefor upon which the county court must order vouchers drawn on the health center fund even though there is no money presently in said fund, provided said indebtedness has been duly provided for in the county health center budget.

March 16, 1961

Honorable Clifford Crouch
Prosecuting Attorney
Taney County
Forsyth, Missouri



Dear Sir:

We have your recent request for an opinion which reads as follows:

"Often times questions arise with bank officials in Taney County regarding the authority of banks to loan money to political subdivisions, such as, counties, municipalities, school districts, road districts, and in particular, the newly established Taney County Health Center. The Health Center was approved by a majority of the voters in Taney County November, 1960; however, it will not get the benefit of 1960 revenues for use during 1961. Since the statutes require the appointment of trustees and organization thereof shortly after the approval of the voters. The Taney County Health Center finds itself in the predicament of operating during 1961 with no operating funds

The trustees have approached the Bank of Taney County, Forsyth, Missouri, for a series of loans during 1961 for the purpose of meeting expenses of initial capital outlay and current operating costs. Officials of the bank ask that I submit this problem for your consideration and study.

Here, we have facing us this basic problem: can a county or road district borrow money from a commercial lending institution to purchase a road grader, truck or other machinery on installment terms without 'floating a bond', and in particular, can the Taney County Health Center, as such, borrow money from said commercial lending institution until such time as it is in receipt of its revenues or

Honorable Clifford Crouch

must the Trustees of the Health Center sign the note as Trustees and as individuals, thereby being jointly and severally liable?"

This opinion is directed particularly to the specific problem concerning which the opinion is requested, namely:

"Can the Taney County Health Center, as such, borrow money from said commercial lending institution until such time as it is in receipt of its revenues or must the Trustees of the Health Center sign the note as Trustees and as individuals, thereby being jointly and severally liable?"

County health centers are established, maintained, managed and operated by the county pursuant to the provisions of Section 205.010, RSMo 1959, upon a two-thirds majority of the votes cast at an election called for the purpose of approving a tax for the center. Section 205.020 provides that if the necessary two-thirds majority is voted in favor of the tax "the county court shall proceed to levy and collect such tax and deposit same in the county treasury to the credit of the health center fund and such fund shall be expended as hereinafter provided." The county court is also required to appoint a board of trustees for the health center who shall hold office until their successors are elected at the next general election. Section 205.031, RSMo 1959.

Section 205.042, RSMo 1959, further provides that the board of health center trustees "shall have the exclusive control of expenditures of all moneys collected to the credit of the county health center fund, and of the purchase of site or sites, the purchase or construction of any county health center buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose." It further provides that "all moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees."

The rate of tax which is authorized by the vote of the people of the county is the maximum rate which may be levied. The board is required to determine annually the rate of the tax necessary, up to but not exceeding the maximum. Section 205.045, RSMo 1959.

Section 205.090, RSMo 1959, requires the board of county health center trustees to prepare and submit to the county budget officer a budget for the ensuing year at the time and in the manner provided by the county budget law applicable to such county.

Your opinion request states that the Taney County Health center "finds itself in the predicament of operating during 1961 with

no operating funds" pending the collection of the 1961 tax levy for the county health center. However, these 1961 taxes, even though collected in the last two months of 1961, will nevertheless be health center revenue for the entire year 1961, and as such, available for use during the entire year, subject to statutory limitations hereinafter discussed. It is assumed of course, that the board of health center trustees in Taney County has complied with Section 205.090, RSMo 1959, by preparing and submitting a budget for 1961.

A review of the applicable statutes makes it clear that there is no authority granted to the board of county health center trustees as such to borrow any money from commercial lending institutions or otherwise. However, the want of such authority does not render the health center entirely impotent during the current year.

Section 205.042, RSMo 1959, as above noted, provides among other matters not only that the board shall have "exclusive control" of all moneys collected to the credit of the health center fund, but that all moneys received for the county health center shall be paid out from the county treasury only upon warrants ordered drawn by the county court "upon properly authenticated vouchers of the board of health center trustees." It follows that if the board of county health center trustees in operating the health center during 1961 incurs an indebtedness within the purpose of the statute under which the health center is operated, and issues properly authenticated vouchers for the payment of such indebtedness, then it becomes the duty of the county court to order warrants drawn upon the county health center fund for the payment of such vouchers.

With respect to virtually identical provisions of the county hospital law, the Supreme Court in State ex rel. Holman v. Trimble, 316 Mo. 1041, 293 S.W. 98, held that the full discretion was vested in the hospital trustees to pass upon and determine the validity of every claim presented and that the county court had no discretion when the terms of the law were otherwise met. The language of the court is as follows (293 S.W. 1.c. 101):

"* * *the only judgment exercised by the county court is to determine whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the fund controlled by the hospital board, the county court could deny warrants."

It therefore appears that there is no barrier to the board of health center trustees operating under the statute and incurring indebtedness for which vouchers may be issued and warrants drawn upon the county health center fund.

Honorable Clifford Crouch

This ruling is predicated upon the assumption that the board has complied with Section 205.090, RSMo 1959, relating to the health center budget. It should be noted that Section 50.700, RSMo 1959, provides that when the clerk of the county court prepares the estimate of county revenue for the current year "ten per cent shall be deducted from total for delinquent taxes to get the net amount estimated for purpose of budget." Although this section is part of the county budget law applicable to counties of the fourth class, we are of the opinion that it is applicable to the health center budget as well. Section 205.090 provides that such budget shall be prepared and submitted "in the manner provided by the county law applicable to such county." Hence, only 90% of the anticipated revenue from the county health center tax levy may be expended during the current year. The fact that there is no money presently in the fund has no bearing upon the right of the board of health center trustees to incur such indebtedness and to require the issuance of warrants in payment thereof.

Section 50.070, RSMo 1959, provides as follows:

"The county court in counties of class one, class three and class four may, by resolution, duly passed by a majority of the judges thereof, and upon order of said court, issue negotiable notes payable in one year or less from the date of issue out of the current county revenues, respectively, to be derived from taxes or other revenues of the county of the year in which said notes are issued; but where taxes are levied for special purposes or revenues derived from special sources other than taxes resulting from a levy, the notes issued against the anticipated revenues derived therefrom shall bear a statement that the said notes are to be paid out of said special taxes or special revenues."

This statute clearly authorizes the county court in the circumstances hereinafter set out to anticipate the tax to be derived from the health center levy for the year 1961 and to issue tax anticipation notes payable out of such 1961 tax revenue.

Section 50.110, RSMo 1959, provides that the aggregate of all such notes may not exceed 90% of the anticipated revenue, and Section 50.090, RSMo 1959, provides that such notes when issued shall not exceed 10% of the total estimated revenue in any one month and the total of such notes shall not exceed 90% of the total anticipated revenue in any one year. Section 50.090 further provides that if said notes, or any thereof, shall not be issued within or at the times so fixed, they may be subsequently issued to the amount so limited. Section 50.100, RSMo 1959, provides that such notes shall be issued to mature in one or more months, but not to exceed twelve months, after date of issue, shall be payable to bearer, shall bear a rate of interest not to exceed 6% per annum from date until maturity, and shall be in

such form as the county court may prescribe.

Therefore, the board of county health center trustees, which has the exclusive power of management with respect to the county health center, may call upon the county court to issue tax anticipation notes in compliance with the foregoing statutes payable out of the anticipated revenues to be derived from the 1961 county health center tax levy.

When so called upon, the county court is vested with discretion, under Section 50.070, RSMo 1959, either to issue such notes or to refuse to comply with the board's request. Said statute provides that the county court "may, by resolution duly passed by a majority of the judges thereof, and upon order of said court" issue the notes. There is no provision in the county health center statute which takes from the county court the discretionary power vested in such court by section 50.070 and Section 50.100. The statutory provision granting the board of county health center trustees exclusive control over all moneys collected, clearly grants to the board authority to compel the issuance of warrants in a proper case in payment of claims against the health center. Thereby it takes from the county court the control it normally exerts over the expenditure of most funds. However, it gives the board of the county health center trustees no power to borrow money nor to compel the county court to do so. The exercise of the power to issue tax anticipation notes when called upon to do so by the county health center trustees remains within the sole discretion of the county court.

It is, therefore, the opinion of this office that it is within the power of the county health center board of trustees, in furtherance of the efficient administration of such county health center, to anticipate in the foregoing manner, to the extent of 90% thereof, the current revenue from the tax levy properly extended on the tax books for the current year, provided the county court shall exercise its discretionary power to issue tax anticipation notes. When the proceeds of any such loan are deposited to the credit of the county health center fund in the county treasury, it will be the duty of the county treasurer to honor warrants duly drawn upon such fund.

It should be noted that under the provisions of Section 26 (a) Article 6 of the Missouri Constitution and the county budget laws enacted pursuant thereto, counties are required to operate on a cash basis and may not become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balance from previous years, except as otherwise provided in the constitution. The effect of the foregoing is that revenue may be anticipated only for the current year, and that the governing body may not obligate a county or other political subdivision of the state

Honorable Clifford Crouch

in a sum in excess of the revenue provided for such year. Hence, no obligations may be incurred which have the effect of anticipating revenue for any other year than the year in which the indebtedness is incurred. The only method of anticipating future revenue is by the issuance of bonds upon the requisite vote of the people of the county.

CONCLUSION

It is the opinion of this office that the Taney County Health Center as such has no power to borrow money from a commercial lending institution or otherwise, but that the Taney County Court, upon request of the board of county health center trustees, may in its discretion issue tax anticipation notes as provided for by Section 50.070, payable out of the county health center tax levy for the year 1961 in an aggregate amount of not to exceed 90 per cent of its anticipated revenue.

The board of county health center trustees may further incur indebtedness and issue duly authenticated vouchers therefor for which the Taney county court must issue vouchers drawn upon the county health center fund in payment thereof, even though there is no money presently in said fund, provided that said indebtedness has been duly provided for in the county health center budget for the year 1961.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

STATE RETIREMENT ACT:
STATE EMPLOYEES:
MUNICIPAL EMPLOYEES:
UTILITIES:
CONSTITUTIONAL LAW:

The General Assembly may constitutionally amend the Missouri State Employees' Retirement System (Sections 104.310 to 104.600, RSMo 1959) by granting prior service credit to a city employee for service rendered by him as an employee of a private utility prior to the date said private utility became municipally owned, when said city properly elects to place its employees under the provisions of the Missouri State Employees' Retirement System.

May 19, 1961

Honorable Jack Curtis
Senator 30th District
Landers Building
Springfield, Missouri



Dear Senator Curtis:

This is in reply to your opinion request of May 3, 1961, wherein you advise that Senate Bill No. 182 proposes to bring city and county employees under the state retirement system, by said city or county electing to do so by resolution or ordinance adopted or passed by its legislative body.

You further advise that, in some instances, private utilities have been taken over by the city or county and said employees of these utilities have been retained by the city and county with their seniority rights.

In addition, said Senate Bill No. 182 makes no provision giving city or county employees credit for prior service, but you state that it may be amended to add such a provision.

Your inquiry then is:

"Can the general assembly legally grant prior service credit for service rendered by an employee to a private utility prior to the date it became municipally owned?"

If there are any limitations on the power of the General Assembly in this regard, they are to be found in Article III, Section 39(3) and Article VI, Sections 23 and 25 of the Missouri Constitution.

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Article III, Section 39(3), provides as follows:

"The general assembly shall not have power:
(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part."

Article VI, Section 23, provides:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Article VI, Section 25, provides:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 40,000 inhabitants to provide for the pensioning of other employees, and the widows and minor children of deceased employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

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In *Gubler v. Utah State Teachers' Retirement Bd.*, 192 P. 2d 580, 2 A.L.R. 2d 1022, fifty former parochial teachers sought to have a 1945 amendment to the "Teachers' Retirement Act" declared valid and constitutional, and interpreted so as to permit them to receive credit in computing retirement benefits for prior services performed as teachers in parochial schools.

Said amendment stated:

"(3) 'Teacher' shall mean any person who is serving under a legal certificate as a legally qualified teacher in a public day or evening school or as a superintendent, or supervising executive, or educational administrator of public schools, or librarian or persons who taught in schools of this state whose credits were approved by the university of Utah or the Utah state agricultural college or the state board of education and who became contributing members of the state teachers retirement system prior to July 31, 1938 . . ." Emphasis supplied.

Article VI, Section 30 of the Utah Constitution contained the same prohibitions as found in Article III, Section 39(3) of the Missouri Constitution.

In refuting the argument that the 1945 amendment was a payment for services which had been previously rendered within the meaning of Article VI, Section 30 of the Utah Constitution, and thus unconstitutional, the court stated:

"Having previously indicated an acceptance of the principle that the purpose of the Teachers' Retirement Act is to attract to and retain in our public school systems, qualified and experienced teachers, we affirm that principle. Our constitutional provision contemplates that to make the payment of additional compensation illegal the services must have been fully performed prior to the

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payment. Such is not the case in this situation. In the present controversy the contracts were still being performed at the time the amendment was made. The teachers' services were still of value to the school system, and the Legislature was entitled to place its value on those services. If a teacher has become experienced through years of teaching, this is a factor which may be given consideration by the Legislature in setting the amount of remuneration that can be paid in the future. If in the judgment of the Legislature the retirement plan will induce experienced and competent teachers to remain in the state school system by receiving additional pay in the form of an assured income upon retirement, then the fact that prior service is included as one of the factors in arriving at the amount of the increase in payments after retirement, does not necessarily taint the act with illegality because this factor tends to grant additional compensation. It can reasonably be established that this factor together with others used by the system has a tendency to carry out the legislative desire to retain competent help active in the teaching vocation. Prior service credit may have a tendency to increase the payments made to the teacher during the time he or she teaches, between the passage of the act and the time of retirement, but this does not contravene the constitutional provision. It may be considered in the nature of an inducement to have experienced teachers remain part of the public school system. If so construed, the act is still valid. The act (not the amendment) can only be invalid in the event we were required to hold that the prior service credit was in effect a gratuity for services previously performed. We are not impressed that the act should be so construed. If there is reasonable doubt about the validity or invalidity of this act, then the duty of this court is to resolve the doubt in favor of constitutionality.

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We believe the legislative purpose was to maintain or better the standards of the teaching vocation in this state, not by attempting to illegally pay teachers for what they had done, but to legally offer them additional compensation if they would continue to devote their energies to instructing the school children of this state. . . ."

In *Hammit v. Gaynor*, 144 N.Y.S. 123, the court was asked to determine if a statute authorizing the retirement and pension of New York City employees with at least 30 years' service was unconstitutional in that it authorized and granted extra compensation to "a public officer, servant, agent or contractor" within the meaning of the prohibition of Article 3, Section 38 of the New York Constitution.

The court, in determining that the statute was constitutional stated:

"The phrase 'extra compensation to a public servant', as used in the Constitution, evidently refers to an additional payment for services performed. It cannot well refer to a promise of compensation for future service, since the amount of that compensation is within the power of the Legislature to fix. The rendering of services by persons of the class affected by the statute now examined is voluntary on their part, and they are under contract of service for no fixed time; hence any promise of reward in addition to a daily, monthly or yearly compensation which looks to the future and depends upon the continued performance of service after the promise is made enters into the consideration for services to be rendered and is not 'extra compensation' nor is it a 'gift.' This element of a prospective benefit to the employee for future services is in no sense lacking from the statute in question. The future period may be short, depending upon the postponement of the employee's condition of incapacity, or, in many cases, of

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his attaining to the full period of service under the act; but the relation of the compensation to the value of the future services is a matter of legislative discretion. Under this statute employees 'who shall have been' in the employment for a certain period may receive pensions upon 'retirement from active service.' The retirement is necessarily to be at some time after the passage of the act, and applies only to persons who until retired shall remain in 'active service' from which by virtue of the statute they are to be retired. Thus the statute makes the promise, not of 'extra compensation', but of a prospective reward under certain conditions to an employee who remains in service for some period thereafter, which, as I have noted, may be short, but none the less involves futurity of performance sufficient to take from the pension, when awarded, the character of a gift or extra compensation, and to bestow upon it the quality of compensation for services; the quantum being within the unrestricted power of the Legislature."

Thus, it may be stated that the General Assembly may by statute grant prior service credit to an employee for service rendered by him to the private utility prior to the date it became municipally owned, when he comes under the State Retirement Act, without being in violation of Article III, Section 39(3), and Article VI, Sections 23 and 25, of the Missouri Constitution.

We find no basis for distinguishing between prior service rendered while the utility was privately owned and service rendered after the utility was acquired by the city.

The rationale is that the General Assembly may do so if such action would be deemed to benefit the public by inducing competent people to enter and remain in public employment, and that such a credit or increase to the annuity of one under the State Retirement Act is merely an additional compensation for performance in the future and not for services previously fully performed.

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CONCLUSION

The General Assembly may constitutionally amend the Missouri State Employees' Retirement System (Sections 104.310 to 104.600, RSMo 1959) by granting prior service credit to a city employee for service rendered by him as an employee of a private utility prior to the date said private utility became municipally owned, when said city properly elects to place its employees under the provisions of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

CORONER:
PUBLIC ADMINISTRATORS:
SUCCESSOR:
GOVERNOR:
TERM:
CITY OF ST. LOUIS:

St. Louis becomes vacant it is the duty of the Governor to appoint a successor who shall serve until the end of the four year term to which the one vacating the office was elected.

As the office of public administrator of the City of St. Louis is vacant it is the duty of the Governor to appoint a successor who shall serve until the first day in January, 1963, at which time the person having been elected at the November, 1962, general election shall take office and serve for the remainder of the unexpired term; i.e., until the first day in January, 1965.

December 28, 1961

Honorable James E. Crowe, Chairman
Board of Election Commissioners
208 South Twelfth Boulevard
St. Louis 2, Missouri

20

Dear Mr. Crowe:

This opinion is rendered in response to your request dated September 15, 1961, as follows:

"The office of Coroner of the City of St. Louis was vacated by the death of Patrick Taylor who was elected Coroner at the general election in November of 1960. Subsequently the Governor of Missouri appointed a successor to this office. It is necessary for us to determine whether this appointment is until the next general election or for the full four year term for which Coroner Taylor was elected."

Further, by telephone, you have asked the additional question as to the office of Public Administrator, namely, should it be voted upon in 1962 or 1964 in light of the recent death of the Public Administrator in St. Louis.

With respect to the office of Coroner, we make the following observations.

Three statutory provisions (Section 58.020, Section 58.040 and Section 105.030, RSMo 1959) bear directly upon this problem.

Section 58.040 deals specifically and directly with the appointment of a coroner to fill a vacancy created by any means and provides that it shall be the duty of the Governor

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to fill such vacancy by appointment of some eligible person who shall discharge the duties of the office of coroner for the remainder of the term for which he is appointed.

The meaning of the phrase "for the remainder of the term for which he is appointed" is set out in Section 58.020:

"At the general election in the year 1948, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a coroner who shall be commissioned by the governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each coroner shall enter upon the duties of his office on the first day of January next after his election."

By the section above quoted it is clear that the intent of the legislature was to establish the term of coroner to run on the basis of four year periods which would not vary. Nowhere else in the statutes is there a law specifically providing for the election of a coroner at any other time.

The meaning of these two sections is clear and unequivocal and would be deemed to control absolutely except for the provisions of Section 105.030. Without setting forth that section here in full, I will state that it provides generally for the appointment of successors to elected state or county offices, who have vacated their offices for any reason, by appointment of the Governor to serve until the first Monday in January next following the first general election ensuing the appointment. Within that section there is a clause specifically exempting its application to the office of Lieutenant Governor, State Senator or Representative, or Sheriff.

Prior to 1955 the exempting clause also contained the word "coroner". Had not the word "coroner" been stricken from the exempting clause by the 68th General Assembly there would be no difficulty in interpreting the present state of the law. However, since they did see fit to remove the word "coroner", it might appear that a conflict exists in the present law.

We must resolve that conflict by reference to the principles of statutory construction. The principle that here applies was reiterated in State vs. Mouser, 284 S.W.2d 473, 1.c. 475:

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"Insofar as we have discovered there are only two statutes under which a successor to a circuit clerk elected by the people, as was respondent, can be elected prior to the end of a full term. These are (1) a general statute, § 105.030, applying to all state and county officers (with certain non-pertinent exceptions), and (2) said § 483.020, referring especially to clerks of courts of record and under which, as stated, the Governor purported to act. The latter section, being special, would govern over the general statute."

Though that case did not deal with an interpretation of the law as it pertains to coroners, it did deal with the construction of Section 105.030, stating that it is a general statute and that some other special statute would prevail over it.

Here we have another special statute and we must presume that the Supreme Court would again rule that such a special statute would prevail over Section 105.030. Further, it will not avail to argue that the legislature by virtue of deleting the word "coroner" from the exempting clause in Section 105.030 then intended specifically to bring coroners within the purview of the said section because they did not specifically repeal Section 58.020 and Section 58.040.

In addition, we may look to the purpose for which Section 105.030 was revised. That purpose is expressed by the revisor of statutes in a note contained in the printed version of Senate Bill 71 (§ 105.030), introduced January 5, 1955, which reads:

"word 'coroner' * is here deleted since Section 58.040 provides that the Governor shall appoint the coroner in case of vacancy."

Obviously the legislature deleted the word "coroner" because it had in mind the fact that there was another statute providing for the appointment of a coroner's successor by the Governor. What they did not have in mind and hence did not take into consideration was the period of time in which the successor was to serve, but that too is taken care of specially in Section 58.020. Therefore, by virtue of the rules of

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statutory construction Section 105.030 does not apply to the appointment of a person to fill a vacancy in the office of coroner.

Now, with respect to the office of public administrator, we make the following observations.

Authority for the election of public administrator is to be found at 473.730. No special provision is made under that law for the tenure of a person appointed to fill a vacancy in the office of public administrator, but it does provide that the term commences on January 1st following the election.

Therefore, the general law pertaining to the appointment of successors to public officers vacating their offices would apply. That is Section 105.030, which provides in essence that it is the duty of the Governor to fill such a vacancy by appointment, that the person so appointed shall serve until the first Monday in January next following the first ensuing general election, unless the term commences on some other date in which case such other date shall control, at which general election a person shall be elected to fill the unexpired portion of the term or for the ensuing regular term if the office would have been up for election at that time anyway.

CONCLUSION

When the office of coroner of the City of St. Louis becomes vacant it is the duty of the Governor to appoint a successor who shall serve until the end of the four year term to which the one vacating the office was elected.

As the office of public administrator of the City of St. Louis is vacant it is the duty of the Governor to appoint a successor who shall serve until the first day in January, 1963, at which time the person having been elected at the November, 1962, general election shall take office and serve for the remainder of the unexpired term; i.e., until the first day in January, 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HLM:BJ:aa

SCHOOL BUS:
VEHICLES, MOTOR:
HIGHWAYS:
TRAFFIC:

Driver of school bus must stop his bus on the unpaved portion (shoulder) of the highway in discharging or taking on passengers, except when impracticable to do so. In event that it is impracticable to stop on shoulder of road, he may stop school bus on paved portion of highway only if school bus is plainly visible for at least 300 feet in each direction to drivers of other vehicles upon the highway. In such event, he may stop bus on paved portion of highway for only such time as is actually necessary to take on and discharge passengers.

March 2, 1961

Honorable Fred Dannov
Assistant Prosecuting Attorney
Boone County
Courthouse
Columbia, Missouri



Dear Mr. Dannov:

This is in reply to your letter of February 11, 1961, addressed to this office, which states in part:

"A situation has arisen in regard to the prosecution of violators passing school busses stopped for the discharge or loading of children (Sec. 304.050). This county's practice has been to advise the drivers that if prosecution is wanted, the drivers will have to stop on the traveled portion of the highway. This is in opposition to the practice of the State Patrol which tells the schools that the driver is to pull to the shoulder off of the road if possible.

* * * *

"The position of the patrol is different. They read the statute as making the duty of the bus driver to stop on the shoulder, unless such shoulder does not permit stopping. They feel the stopping on the shoulder increases the safety factor. They cite as controlling an opinion of the Attorney General to William Brown, Prosecuting Attorney of Sedalia, Missouri on April 15, 1950.

"In any event, for consistency and uniformity and because the statute is unclear as it

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states 'on the highway' and was enacted in 1957, seven years after the Attorney General's opinion, this office requests clarification as to the meaning of the statute as to where the drivers are to stop to unload and load."

Section 304.050, V.A.M.S., states as follows:

"1. The driver of a vehicle upon a highway upon meeting or overtaking from either direction any school bus which has stopped on the highway for the purpose of receiving or discharging any school children and whose driver has in the manner prescribed by law given the signal to stop, shall stop the vehicle before reaching such school bus and shall not proceed until such school bus resumes motion, or until signalled by its driver to proceed.

"3. No driver of a school bus shall take on or discharge passengers while the vehicle is upon the road or highway proper unless the vehicle so stopped is plainly visible for at least three hundred feet in each direction to drivers of other vehicles upon the highway and then only for such time as is actually necessary to take on and discharge passengers."

Section 304.015, V.A.M.S., provides for the parking and stopping of motor vehicles on Missouri highways. Said statute states:

"1. All vehicles not in motion shall be placed with their right side as near the right-hand side of the highway as practicable, except on streets of municipalities where vehicles are obliged to move in one direction only or parking of motor vehicles is regulated by ordinance."

Pursuant to Section 304.025, V.A.M.S., the definition of the word "highway" is as follows:

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"2. The word 'highway' whenever used in sections 304.014 to 304.026, shall mean any public road or thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality."

The word "highways" as used in the Motor Vehicle Laws, has been the subject of judicial comment in this state. In Crocker vs. Jett, 93 SW2d 74, loc. cit. 76, the following reference is made to the word:

"It is pertinent to observe in this connection that the word 'highways' is used in the statute in its popular, rather than its technical, sense, and is intended to include all highways traveled by the public, regardless of their legal status. Phillips v. Henson, 326 Mo. 282, 30 S.W. (2d) 1065."

In LaRue v. Borrman et al., 22 N.Y.S. 2d 209, the question for determination was a proper definition of the word "highway." The shoulders were held to be an integral part of the highway in the following language, l.c. 213:

"The shoulder of a highway is a part of the highway and may be used for travel."

Therefore, it may be stated that, as a result of the statutory definition quoted above and the liberal interpretation given by our courts, the word "highway" would include the shoulders of the highway in addition to the paved or traveled portion of said highway.

The word "practicable" as used in the Motor Vehicle Act is defined in Lauck v. Reis, 310 Mo. 184, l.c. 201, as synonymous with "possible and feasible." In Klohr v. Edwards, 94 SW2d 99, its meaning was compared with the word "practical," and the court stated, l.c. 104:

" * * * Though there is a difference in the strict lexical meaning of the two words, they are not uncommonly used as synonymous; that is, as meaning feasible, or capable of being done or accomplished."

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It is obviously in this sense that the word 'practical' is used in the instruction, and it could hardly be otherwise understood in the connection in which it is used. 49 C.J. 1309, 1310."

It thus follows that the driver of a motor vehicle may stop his motor vehicle on the paved portion of the highway, as near the right-hand side of the said paved portion of the highway thereof as practicable, only when the condition of the highway at the stopping point where it would be impracticable for the said driver to stop the said motor vehicle off of the said paved portion.

Section 301.010(23), V.A.M.S., defines a school bus as follows:

"'School bus,' any motor vehicle used solely to transport students to or from school or to transport students to or from any place for educational purposes."

In this connection, the right or privilege of a school bus to stop on the highway would be guided by the rule applying to "motor vehicles" under the statute, i.e., school busses could not stop on paved portion of highway unless impracticable to do so, unless there is specific legislation concerning said school busses.

Section 304.050, V.A.M.S., states as follows:

"1. The driver of a vehicle upon a highway upon meeting or overtaking from either direction any school bus which has stopped on the highway for the purpose of receiving or discharging any school children and whose driver has in the manner prescribed by law given the signal to stop, shall stop the vehicle before reaching such school bus and shall not proceed until such school bus resumes motion, or until signalled by its driver to proceed.

* * * *

"3. No driver of a school bus shall take on or discharge passengers while the vehicle

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is upon the road or highway proper unless the vehicle so stopped is plainly visible for at least three hundred feet in each direction to drivers of other vehicles upon the highway and then only for such time as is actually necessary to take on and discharge passengers."
(Underlining ours.)

It is to be noted that the Legislature used the phrase "on the highway" in Section 304.050(1), V.A.M.S., and "upon the road or highway proper" in Section 304.050(3), V.A.M.S.

Therefore, it is evident that the intention of the Legislature in Section 304.050(3) was to lay down the conditions which must be observed when the driver of a school bus is authorized to stop the bus on the paved portion of the highway because it is impracticable to stop on the shoulder.

CONCLUSION

The driver of a school bus must stop his bus on the unpaved portion (shoulder) of the highway in discharging or taking on passengers, except when impracticable to do so. In the event that it is impracticable to stop the school bus on the shoulder of the road, he may stop his school bus on the paved portion of the highway only if his school bus is plainly visible for at least three hundred feet in each direction to drivers of other vehicles upon the highway. In such event, however, he may stop said bus on the paved portion of the highway for only such time as is actually necessary to take on and discharge passengers.

This opinion supersedes the opinion rendered by this office on April 15, 1950, to William F. Brown, Prosecuting Attorney, Pettis County, Sedalia, Missouri, which opinion is hereby withdrawn.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

TFE:vm;ml

COUNTY COURTS:
ASSESSMENT OF PROPERTY FOR TAXATION:
TAXATION:
CLASS THREE COUNTIES OF OVER 40,000:
ASSESSORS:

Any county having a population over 40,000 is authorized to employ experts to replat and prepare maps and to locate and evaluate real estate in said county for the purpose of furnishing information of value to the county assessor in securing a full and accurate assessment of all property in the county liable to taxation.

*See also
Opinion 451-1963*
October 4, 1961



Honorable Donald E. Dalton
Prosecuting Attorney
St. Charles County
First National Bank Building
St. Charles, Missouri

Dear Mr. Dalton:

This will acknowledge your recent request for an opinion of this office as follows:

"St. Charles County is a county of the third class having a population of 52,671. The County Court is considering entering into a contract employing a professional firm to re-plat, and prepare maps for certain portions of St. Charles County and to locate and evaluate all real estate in St. Charles County. The real estate valuation would be used by the County Assessor together with all other information which he has available in an examination of assessments and a possible re-assessment of all real estate in St. Charles County. I am requesting an opinion from your office as to whether or not the County Court of St. Charles County is authorized to enter into such a contract.

"I believe that it is common knowledge that St. Charles County has peculiar problems in connection with real estate valuation. St. Charles was the First Capitol of the State and is one of its oldest cities. The fluctuation in real estate values from the time of its early history to the present time has been tremendous. The large, recent population increase has made a great demand for houses and lots and has resulted in increased land values. The report of the County

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Assessor and the Board of Equalization is that it has been impossible for them to keep up with and keep current the assessed valuations of real estate in this County through their ordinary procedures and with their authorized regular personnel. St. Charles County had a population of 29,834 in 1950 and increased to 52,671 in 1960. It has a total area of 561 square miles compared to the 497 square mile area of St. Louis County."

Your letter refers to Section 137.230, RSMo 1959, and the recent case of Hellman v. St. Louis County, 302 S.W. 2d 911. We have concluded that the statute referred to and the cited case clearly authorize the county court of St. Charles County to enter into a contract such as you outlined in your letter.

Section 137.230, RSMo 1959, provides in part as follows:

"* * * In counties having a population of over forty thousand the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of the county or any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in the county or designated part thereof or otherwise, and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury." (Emphasis supplied.)

In State ex rel and to Use of Tadlock v. Mooneyham, 212 Mo. App. 573, 253 S. W. 1098, the Springfield Court of Appeals construed Section 12797, RS 1919, in which substantially the above quoted language was contained. The Court held that such statute constituted an express grant of power to the county court of counties having a population over forty thousand to employ a suitable person to assist in discovering property which had escaped assessment and taxation and to furnish lists of same to the proper officers so that said property could be assessed and taxes thereon collected. Said the Court (253 S.W., 1.c. 1099):

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"* * * The legislature evidently understood that in the larger counties the opportunity for concealing wealth from taxation would be much greater than in the smaller counties, and they evidently intended by the provisions of the statute aforesaid to put it in the power of the county court in those counties to ferret out property that was being withheld from assessment and place it upon the tax books of the county, so that it should bear its proportion of the burdens of taxation."

In *Hellman v. St. Louis County, Mo.*, 302 S.W. 2d 911, the Supreme Court, en banc, sustained the validity of contracts between St. Louis County and two appraisal companies for the appraisal of certain real estate in designated parts of said county and to prepare and deliver to the county assessor certain manuals on procedure, field record cards, land value maps, indexing cards, identifying classification and other detailed information and services. All of such services contracted for were in connection with the ultimate independent assessment of the real estate by the county assessor for purposes of taxation. The court cited Section 137.230 as bearing upon "the precise question here involved" and held, 1.c. 915:

"It seems clearly to authorize contracts such as are here involved, but, in any event, it definitely amounts to a declaration of public policy that the county courts of counties of more than forty thousand population may adopt suitable and efficient means or agencies to procure an accurate assessment of all or any portion of taxable property in such counties and pay for such services out of the county treasury." (Emphasis supplied.)

As stated in your letter, the proposed contract your county court has in mind contemplates the employment of a professional firm to re-plat and prepare maps for certain portions of the county and to locate and evaluate all real estate in St. Charles County. It is assumed that the expert appraisals would not be binding upon the county assessor but would simply be of aid to such official "in determining the true value of, and thereby more accurately to assess, the taxable property of the county in accordance with his statutory duties."

In all essential respects, the proposed contract is similar to those involved in the *Hellman* case, and we believe that the ruling in that case is decisive of the question here presented, and that such proposed contract is clearly authorized by Section 127.230, RSMo 1959.

The fact that St. Louis County is a county of the first class operating under a home rule charter does not, in our opinion, militate against the authority of the Hellman case nor the applicability of Section 137.230. It is true that St. Charles County is a county of the third class, but the important fact is not its classification but its population, which in this instance is in excess of forty thousand. It is to be noted that Section 137.230, which is applicable generally to all counties irrespective of classification whose population is in excess of forty thousand, specifically provides that the county court of such county may adopt any suitable and efficient means or method to the end of securing a full and accurate assessment of all property therein liable to taxation.

The statute expressly authorizes the county court to adopt any means which would have for its purpose securing both a full and an accurate assessment. The method adopted may not only be by procuring maps, plats and abstracts of title, but "otherwise." "Otherwise" can mean only such other method as may reasonably be of aid to the assessor to make an accurate as well as a full assessment of all taxable property. Section 137.115, RSMo 1959, in addition to requiring the assessor to make a list of all taxable property, directs him to "assess the property at its true value". An accurate assessment would necessarily be one based on the true value of the property. In our opinion, expert appraisals could well be resorted to by the assessor in aiding him in determining the true value of the property and "thereby more accurately to assess" such property. Hence, a contract employing experts to render such assistance would be a proper and suitable method for ultimately securing an accurate assessment of the taxable property in the county. If the statute should be construed to limit the power of the county court merely to procuring maps and plats and assistance in locating property, no substantial effect would be given to the express statutory intent relating to securing an accurate as well as a full assessment, and the words "or otherwise" would serve no purpose.

The Hellman case specifically ruled that the adoption of the method therein involved (the employment of expert assistance) is "certainly" not contrary to the provisions of Section 137.230, (302 S.W. 2d, 1.c. 916).

The discussion in the Hellman opinion concerning the home rule charter and the ordinances adopted pursuant thereto was necessary therein for the purpose of determining whether the method utilized and the procedure followed in St. Louis County was authorized by the charter as well as by the statute applicable generally. The court was necessarily required to consider whether the home rule charter had made other provisions with respect to

Honorable Donald E. Dalton

the means of procuring an accurate assessment than that provided for in the statutes.

The pertinent charter provision of St. Louis County (Article III, Section 22[7]) is no broader in scope and no more specific in authorizing such contracts than Section 137.230. Such charter provision simply authorizes the council by ordinance "to provide for the assessment . . . of all taxes . . . and to pre-scribe a method or system to facilitate the assessment of . . . taxes." Whatever authority the council had to enact the ordinance permitting the employment of experts (other than Section 137.230) must be found within the foregoing charter provision. The method prescribed by the ordinance "to facilitate the assessment" was obviously not spelled out by the charter provision, but came within its intent just as the contract here contemplated is a method within the intent of the statute.

The general law of the State, as pointed out by the court, provides for the county court in its discretion to adopt suitable means of securing a full and accurate assessment and to provide means to pay therefor out of the county treasury, but under the ordinance of St. Louis County only the assessor himself could initiate the employment of experts. It was only upon request of the assessor with the approval of county council that the county supervisor was authorized to enter into such contracts. A home rule charter must provide for the exercise of all the powers and duties of counties and county officers prescribed by the constitution and laws of the state but need not exercise such powers in precisely the same manner as prescribed by such general law. Upon consideration of all of the factors, the court ruled that the means and methods adopted by St. Louis County were reasonable and not contrary to the provisions of the statute and therefore the contracts were properly executed. There is nothing in the court's opinion which reasonably indicates that the county courts of counties having a population of over forty thousand and which do not operate under a home rule charter may not enter into a contract as contemplated by your county court for the purpose of securing a full and accurate assessment of the property therein liable to taxation.

Cases such as King v. Maries County, 297 Mo. 488, 249 S.W. 418, are not in point on this question. That case involved the right of a county court to employ an abstractor to aid in the collection of delinquent taxes. At the time, the statute spelled out a complete system for the collection of such taxes and did not authorize the employment of an additional agency. On the contrary, Section 137.230 emphasizes the legislative intent that statutory provisions specifically spelled out for securing a full and accurate assessment of property were not intended to exclude the adoption of other methods by county courts of counties having a population of over 40,000.

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The fact that bills authorizing the employment of skilled deputies to make expert evaluations failed of passage both in the 70th and 71st General Assemblies in no way constitutes a legislative construction that Section 137.230 does not authorize contracts of the nature proposed. Aside from the fact that such bills provided for the employment of deputies, the important distinction is that they were applicable to all counties irrespective of population. Section 137.230 affects only those counties having a population of more than 40,000. If the unsuccessful attempts to procure passage of House Bill 254 (71st Gen. Ass.) and House Bill 82 (70th Gen. Ass.) are of relevance at all, they would indicate at best an attempt to extend to county courts of counties having a population less than 40,000 the authority already vested in larger counties.

Inasmuch as Section 137.230, RSMo, clearly authorizes such contracts to be executed by county courts of all counties having a population of over forty thousand, as held by the Hellman case, it is our opinion that the fact that your county is a county of the third class has no bearing upon the question. We do not hold that the statute has any application to any counties of the third class other than those having a population of over forty thousand.

CONCLUSION

It is the opinion of this office that the County Court of St. Charles County, a county having a population over forty thousand, is authorized to employ experts to re-plat and prepare maps and to locate and evaluate real estate in St. Charles County for the purpose of furnishing information of value to the county assessor in securing a full and accurate assessment of all property in the county liable to taxation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:BJ



July 10, 1961

Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Davenport:

We are in receipt of your letter stating that the Probate Judge has asked you to request an opinion relative to hospitalization in a private hospital for persons where a petition has been filed alleging mental illness, but during the period before the hearing and judgment of the Probate Court declaring such person to be mentally ill.

Our impression from reading your letter is that this is a hypothetical question. Therefore we are answering by way of an advisory letter instead of a formal opinion.

The following provisions of the Revised Statutes of Missouri, 1959, appear to be applicable to the question here presented:

Section 205.580.

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 205.590.

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

The above sections provide that the county court shall provide for the relief, maintenance and support of poor or

July 10, 1961

indigent persons. Section 475.085 provides that the costs of an inquiry into the competency of an indigent person shall be paid by the county. In addition Section 475.355 employs this language, "... the judge may cause the person to be apprehended and may employ any person to confine him in some suitable place until the earliest reasonable date on which a hearing may be had on the information in the probate court and judgment thereon." The next subsection of the law provides that the expense therefor shall be paid out of county funds if the individual is found to be indigent.

The Supreme Court of Missouri in *Cox v. Osage County*, 15 S.W. 765, in discussing earlier versions of our present indigent insane statutes, said:

"... there can be, it would seem, no question, not only that it was the duty and within the power of the probate court to make the order in this case for the restraint, support, and safe-keeping of Molliter, to make the allowance to the plaintiff for the expenses thereof, and certify the same to the county court, but that it was the duty of the county court--there being no question that the expense was incurred, that the allowance was reasonable, that the lunatic had no estate, and there was no person bound for his support--to order the same to be paid out of the county treasury."

With our present emergency admission procedures it may well be that the factual question raised here will seldom occur. However, if the proper authorities take the allegedly insane indigent person into custody, the county would appear to be responsible for the expenses of confinement and inquiry into his competency. This would include, among other things, necessary medical care and hospitalization where ordered by the proper authority.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Clyde Burch
Assistant Attorney General



July 20, 1961

Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

We are in receipt of your letter requesting an opinion of this office, which letter reads as follows:

"I have been requested to obtain the opinion of your office as to whether live minnows in possession of a licensed, privately owned, minnow hatchery on January 1st of any year are taxable property to be assessed by a county Assessor and entered on the tax rolls the same as other personal property, and also whether a county merchant's license is required for such a hatchery."

Further information supplied by you indicates that the minnows are sold mainly from the hatchery at wholesale with a relatively small retail sale in each case, and that none of the hatcheries raises minnows on a contract basis.

Enclosed please find an official opinion of this office rendered under date of September 20, 1950, to the Honorable Clarence Evans, holding that chicken hatcheries which are not operated as a part of a farming operation nor hatching eggs on a contract basis are to be assessed and taxed as merchants. Inasmuch as the business involved in your inquiry is similar in nature to that considered in the enclosed opinion, it must be concluded that the operator of minnow hatchery also falls within the statutory definition

of merchant quoted therein (now Sec. 150.010, RSMo 1959). The qualification as to the farm product's exemption (now Sec. 150.030, RSMo 1959) mentioned in that opinion is not applicable in your case since minnows could hardly be considered to be farm products.

It is the opinion of this office, therefore, that live minnows in a hatchery operated under the circumstances you describe are not to be assessed as personal property on January 1st, but rather are to be assessed and taxed under the merchant's tax as set out in Sections 150.010 thru 150.070.

In respect to your inquiry as to the requirement of a merchant's license for these hatcheries, we direct your attention to Section 150.100, RSMo 1959, which is as follows:

"No person, corporation, co-partnership or association of persons shall deal as a merchant without a license first obtained according to law; and every applicant for a license shall affirmatively state in a written application whether goods, wares and merchandise are to be sold by applicant at wholesale, at retail, or at both wholesale and retail. Every person or corporation so offending shall upon conviction thereof be deemed guilty of a misdemeanor."

Having held that the operators of minnow hatcheries in these circumstances are merchants, it follows that each must obtain a merchant's license in accordance with the foregoing statute.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml
Enc.

PUBLIC SCHOOL RETIREMENT SYSTEM:
INVESTMENT FUNDS:
LIFE INSURANCE COMPANIES:
CASUALTY INSURANCE COMPANIES:
STOCKS:

Since House Bill 214 amending Section 169.040, RSMo 1959, became effective on October 13, 1961, the Board of Trustees of the Public School Retirement System of Missouri are authorized to invest funds of the system which

are in excess of a safe operating balance in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

November 13, 1961

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System of Missouri
Jefferson Building
Jefferson City, Missouri



Dear Mr. Donahoe:

This is in answer to your request for an opinion dated September 18, 1961, and which reads as follows:

"House Bill No. 214 as enacted by the last session of the General Assembly and approved by the Governor repeals Section 169.040, Revised Statutes of Missouri, 1959, and enacts in lieu thereof one new section, No. 169.040. This section deals with the collection, deposit, disbursement and investment of funds of the retirement system by the Board of Trustees. Subsection 2 of this section designates the classes of securities in which funds of the system may be invested.

"The only change which will be made in Section 169.040 when House Bill 214 becomes effective will be in subsection 2 (h), in which the words 'or casualty insurance companies' will be included. Section 169.040, 2 (h) will then read as follows:

"Any securities as permitted by laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri."

"For our guidance in administration, we wish to request an official opinion which will answer the following: After House Bill 214 becomes effective, will the Board of Trustees be empowered to invest funds of the system in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein?"

Prior to October 13, 1961, funds of the Public School Retirement System of Missouri could have been invested in securities in the same manner as permitted by the laws of Missouri relating to life insurance companies organized under the laws of Missouri. When House Bill No. 214 became effective on October 13, 1961, Section 169.040, 2 (h), RSMo 1959, was amended to permit investment of the funds in securities as permitted by the laws of Missouri relating to casualty insurance companies as well as life insurance companies organized under the laws of Missouri.

Life insurance companies are defined in Sections 376.010 and 376.020, RSMo 1959, and the investment of the capital, reserve, and surplus funds of life insurance companies organized under the laws of the State of Missouri is governed by Section 376.300, RSMo 1959, and certain other statutory provisions which are not applicable to your inquiry. The investment in common stocks by life insurance companies is limited by Section 376.305, RSMo 1959.

Insurance companies other than life, or "casualty insurance companies" are described and defined by Section 379.010, RSMo 1959. The investment of capital and other funds of casualty insurance companies is governed by Section 379.080, RSMo 1959. This section provides in part as follows:

"* * * and the remainder of the capital of said companies and their other assets may be invested either in the property or securities in this section above mentioned, * * * or in stocks, bonds or evidences of indebtedness issued by corporations organized under the laws of this state, or of the United States, or of any other state, * * * provided, that no such insurance company may buy stock in any company to an amount which will give the company so buying the

Mr. G. L. Donahoe

virtual control of any other corporation, * * * and no such company shall invest more than thirty-five per cent of the surplus to policyholders of such acquiring company, or fifty per cent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any other such corporation."

This section expressly authorizes the investment of capital and other assets of casualty insurance companies in stocks of corporations organized under the laws of Missouri, the United States, or any other State. This includes both common and preferred stocks. Therefore, beginning October 14, 1961, the Board of Trustees of the Public School Retirement System of Missouri is empowered to invest funds of the system in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein.

There are certain restrictions contained in Section 379.080 concerning the investment of the first two hundred thousand dollars of the capital of casualty insurance companies, and certain limitations on such insurance companies concerning the amount permitted to be invested in the stock of other companies. These are restrictions on the initial capital investments and limitations on the amount of investments of the casualty insurance companies. They are not restrictions or limitations on the type of securities in which investment is permitted. Subsection 2 (h) of Section 169.040, RSMo, Laws 1961, p. _____, now provides that the Public School Retirement System may invest all funds under its control which are in excess of a safe operating balance in . . .

"Any securities as permitted by laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri." (Emphasis supplied).

Casualty insurance companies organized under the laws of Missouri are permitted to invest funds in stocks, (both common and preferred) issued by corporations organized under the laws of the United States or any State therein. The Public School Retirement System is permitted to invest its funds which are in excess of a safe operating balance in any securities which are permissible investments for casualty insurance companies. Therefore, the Public

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School Retirement System is empowered to invest its funds which are in excess of a safe operating balance in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein.

We feel it appropriate at this time to call your attention to the case of Rand et al. v. Mckittrick, 142 S.W. 2d 29, in which Judge Westhues referred to the Restatement of the Law, on Trusts, and then stated at page 31, as follows:

"As to the duty of a trustee in making investments, see sec. 227, page 645 of the same book, where we find the rule as follows:

'In making investments of trust funds the trustee is under a duty to the beneficiary

'(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.'

"This latter statement is the yardstick generally used by the courts of the union in determining the duties of a trustee. Courts following the New York rule, as well as those following the Massachusetts rule, are in perfect harmony on this question. It is also the rule in this state. See Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333, loc. cit. 339 (5).

"[1,2] An analysis of these cases will disclose that the courts of the land have required trustees of trust funds to exercise a greater degree of care and caution when investing such funds than prudent men ordinarily exercise when investing their own funds. Investments which are speculative in nature have been universally tabooed, by the courts of the union, as proper investments for trust funds. Yet prudent men may and do

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invest in speculative enterprises. Wild v. Brown, 120 N. J. Eq. 31, 183 A. 899. Hence the rule is well stated, Restatement of the Law, on Trusts, supra, that trustees may 'make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.' The part we have italicized is important. * * * An examination of the cases will demonstrate that trust funds, in those states where the courts, legislature, or the people by constitutional provision have prohibited the investment of trust funds in stocks, have fared no better than have the trust funds in the states following the Massachusetts rule. We think this demonstrates that the preservation of trust estates depends more upon the integrity, honesty and business acumen of the trustees than it does upon arbitrary legal classification of securities wherein trust funds may be invested. * * *

The Court then quoted with approval from the case of Walker v. Buhl, 211 Mich 124, 178 N.W. 651, 12 A. L. R. 569, as follows:

"When such a fund passes into the hands of a trustee, it becomes impressed with a double duty: First, to so invest it that it can be turned over at the expiration of the trust period without loss; and, second, to secure an income therefrom. He must act honestly and faithfully, and in what he believes to be the best interest of the cestui que trust. He must exercise a sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters employ in their own affairs when making a permanent investment, in which the primary object is the preservation of the fund and the secondary one that of obtaining an income therefrom. He must not permit himself to take

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the hazard of an investment with the hope of largely increasing the fund as he might, perhaps, do in the prudent management of his own estate. The entire element of speculation must be removed. He must at all times remember that he is handling a trust fund, the care of which has been intrusted to him in reliance on his integrity, fidelity and sound business judgment."

In the absence of specific statutory restrictions on this type of investment, the Board of Trustees of the Public School Retirement System of Missouri, in administering and investing the funds of the system, are bound by this general law respecting trusts and trustees.

We assume that the Board of Trustees are fully aware of the other provisions of Section 169.040, RSMo 1959, and the requirement that they shall see that the funds are safely preserved and provide appropriate safeguards against loss by the system in any contingency.

CONCLUSION

Since House Bill 214 amending Section 169.040, RSMo 1959, became effective on October 13, 1961, the Board of Trustees of the Public School Retirement System of Missouri are authorized to invest funds of the system which are in excess of a safe operating balance in common stocks and preferred stocks of corporations organized under the laws of the United States or any state therein subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WWW:aa:ms

STATE MENTAL HOSPITALS:
DISCHARGED CONVICTS:
PENAL INSTITUTIONS:
CONVICTS, ALLOWANCE WHEN
DISCHARGED:
PENITENTIARY:

Superintendent of the hospital in his sole discretion may furnish all or any part of the allowances provided in Section 216.350, V.A.M.S. to a convict when discharged, provided the convict is discharged from the hospital at the time his sentence in the penal institution expires. A prisoner confined in a penal institution when paroled or discharged therefrom is entitled to all allowances provided for in Section 216.350, V.A.M.S.

January 3, 1961

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Honorable Addison M. Duval, M.D.
Director, Division of Mental Diseases
1702 W. Dunklin Boulevard
Jefferson City, Missouri

Dear Dr. Duval:

In your letter of November 4, 1960, you request an opinion on two questions regarding the interpretation of Section 216.350 and Section 546.627, V.A.M.S., stating as follows:

"Specifically, does this section mean that every prisoner who is finally discharged from the Department of Corrections to the Fulton State Hospital at the termination of the individual's sentence 'shall be furnished civilian clothing, including a suit, hat and shoes, and twenty-five dollars in money'?

In the second instance, if such patient is eventually discharged from the Fulton State Hospital, is he entitled to 'a sufficient sum to transport him to the county from which he was sentenced and such other money and property belonging to the prisoner which have been in custody and control of the prison authorities'?"

Section 216.350, V.A. M.S., Laws of Missouri 1955, page 318 provides:

"Each prisoner discharged from an institution within the division or paroled shall be furnished civilian clothing including a suit, hat and shoes, and twenty-five dollars in money. In addition, he shall receive a suffi-

cient sum to transport him to the county from which he was sentenced and such other money and property belonging to the prisoner which have been in the custody and control of the prison authorities."

In construing a statute, all statutes applicable to subject involved must be read and construed together, and if possible, harmonized so each is given force and effect. *State v. Taylor* 328 Mo. 395, 40 S.W. 2d 1079.

Section 216.350, supra, was first enacted in 1955. In substance it provides that each prisoner discharged or paroled from a penal institution shall be furnished civilian clothing including a suit, hat, and shoes, twenty-five dollars in cash and sufficient money to transport him to the county from which he was sentenced. Furnishing these items to each prisoner discharged or paroled is not a matter of discretion with the prison official. Each prisoner discharged or paroled is entitled to all the benefits of this section as a matter of right at the time of discharge or parole from the prison.

Section 546.627 V.A.M.S. (Laws of Missouri 1959 H. B. 261) provides as follows:

"1. When a prisoner who has been transferred from a correctional institution to a state mental hospital recovers before the expiration of his sentence, the superintendent of the hospital shall so certify in writing to the division of classification and assignment. He shall thereupon be transferred to such correctional institution as the division may direct.

"2. A prisoner who has been committed to or transferred to a state mental hospital and is still mentally ill at the expiration of his sentence may be discharged and delivered to any person who is able and willing to maintain him comfortably and to the satisfaction of the superintendent of the hospital if, in the opinion of the superintendent, it is reasonably safe for the person to be at large. Before discharging the prisoner the superintendent shall receive verification of the expiration of the prisoner's sentence from the director of corrections. The person so discharged may, in the discretion of the superintendent, be provided with the whole or a portion of the allowances granted to discharged prisoners by section 216.350, RSMo. The cost of such allowances shall be paid from the same funds as are allowances granted to persons discharged directly from a correctional institution.

"3. When the term of a prisoner who has been committed or transferred to a state mental hospital has expired and the person, in the opinion of the hospital superintendent is still mentally ill and for the welfare and safety of himself and others should remain in the hospital for custody, care and treatment, he shall be retained in the hospital only after proper proceedings have been instituted and held as provided by section 202.807, RSMo, for hospitalization by judicial procedure; except that he may be retained for not more than thirty days after the expiration of his sentence for the purpose of initiating such proceedings."

Section 546.627, supra, deals with prisoners that have been transferred from a penal institution to the State Mental Hospital.

Under subsection 1, if the prisoner recovers from his mental disability before his sentence expires in the penal institution he is to be returned to the penal institution and when discharged is entitled to the benefits of Section 216.350, supra, as though he had not been transferred to a mental hospital.

Subsection 2 of Section 546.627, supra, provides in substance that when a prisoner is an inmate in a state mental hospital at the time his sentence expires in a penal institution and is still mentally ill he may be "discharged and delivered" to any person who is able and willing to maintain him to the satisfaction of the superintendent of the hospital, if in the opinion of the superintendent it is reasonably safe for the prisoner to be at large. The person so discharged in the discretion of the superintendent may be provided with the "whole or a portion" of the allowances granted under Section 216.350, supra, and the cost of such allowances shall be paid from the same funds as are allowances granted to persons discharged "directly" from the correctional institution to which he was sentenced. This subsection applies only to those persons who are still patients in the State Mental Hospital at the time their sentence in the penal institution expires and who have not completely recovered from their mental disorder and who have not been transferred back to a penal institution and who are released from the mental hospital by the superintendent of the hospital to the custody of persons whom the superintendent finds are able and willing to maintain the prisoner. A prisoner discharged from the State Mental Hospital under these conditions is entitled to only the allowances provided for under Section 216.350, supra, that the superintendent of the hospital in his discretion thinks he should have but not to exceed the allowances provided for under Section 216.350. The authorities at the penal institution have no control over this allowance other than to pay it or reimburse the hospital. This subsection applies only to those persons who are released from the State Mental Hospital at the same time that their sentence at the penal institution expires.

Subsection 3 or 549.051, supra, governs the disposition of the prisoners confined in the State Mental Hospital who in the opinion of the superintendent of the hospital have not recovered from their mental disability at the time their sentence expires at the penal institution and because of their mental condition should not be released. Such prisoners are to be retained in the hospital until a hearing is held as provided for in Section 202.807, V.A.M.S. for hospitalization by judicial proceedings but they cannot be retained more than 30 days after the expiration of their sentence in the penal institution. After the expiration of 30 days the prisoner must be discharged or released from said hospital unless the prisoner is ordered committed as a result of a judicial hearing as provided in Section 202.807, supra. Subsections 1 and 2 of section 549.051, supra, are clear and unambiguous in their meaning. The only ambiguity is as to the intent and meaning of subsection 3 of said section. This statute must be considered as a whole and not by separate or distinct paragraphs. It should be liberally construed because it is remedial legislation. Its purpose in part is to prevent those who have been imprisoned in penal institutions from being discharged or released without some assistance to meet their temporary needs. Those persons finally discharged under the terms of paragraph 3 may be just as much in need of assistance as those discharged under paragraph 2.

Under paragraph 3 the prisoner may be held not to exceed thirty days unless proceedings are initiated in probate court for his commitment. During this time he is being held in the State Hospital under and by virtue of his commitment to the penal institution although the period specified in the commitment has expired. If during the thirty-day period proceedings are had in probate court and the probate court orders him committed he is not entitled to any part of the allowance provided for in Section 216.350 because he is not discharged from the hospital. On the other hand, if no proceedings are instituted within thirty days after his prison sentence has expired, or if proceedings are instituted in probate court and the probate court refuses to commit him, he must then be discharged by the hospital authorities and this discharge must be considered as a discharge at the expiration of his term even though it may be thirty days or more after the termination of his sentence. This is so considered because he has been held in the State Hospital during this additional time by virtue of his commitment to a penal institution. Therefore, a prisoner discharged from the State Mental Hospital under the provisions of paragraph 3 is likewise entitled to the allowances provided for under paragraph 2 within the discretion of the superintendent of the hospital where he is being released.

CONCLUSION

It is our opinion:

1. The allowances provided in Section 216.350, supra, must be offered or paid each prisoner who is discharged from the penal

institution by the prison authorities at the expiration of his sentence. The prisoner so discharged is entitled to the benefits as a matter of right and the prison authorities have no discretion on any of the allowance except the amount needed for transportation.

2. The allowances provided in Section 216.350, supra, may, in the discretion of the superintendent of the State Mental Hospital, be given any prisoner who is confined in said hospital at the expiration of his sentence in the penal institution and who is discharged from said hospital under the terms and conditions specified in paragraph 2. The allowance to be given cannot exceed the amount specified in Section 216.350, supra, but it may be less than that amount depending entirely upon the discretion of the superintendent of the hospital from which the prisoner is released.

3. A prisoner who is discharged from a state mental hospital under the provisions of paragraph 3 because no proceedings are instituted in probate court within thirty days after the expiration of his prison sentence, or who is discharged from the hospital because the probate court refuses to issue a commitment is entitled to the same allowance as in paragraph 2 even though the prisoner may not be released from the hospital within the thirty-day period.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

John M. Dalton
Attorney General

NM:ms

TRAINING SCHOOLS:
STATE TRAINING SCHOOLS:
JUVENILE COURTS:

Children committed to a State Training School for mentally retarded children by the juvenile court shall be accepted by said school subject to availability of suitable accommodation at the school.

January 16, 1961



Honorable Addison M. Duval, M. D.
Director, Division of Mental Diseases
1702 West Dunklin Street
Jefferson City, Missouri

Dear Dr. Duval:

In your letter of November 28, 1960, you submit the following question:

"Senate Bill #15, enacted by the 69th General Assembly, under Section 211.220, clearly states that 'the order of commitment shall be binding upon the hospital or institution to which the child is committed.'"

"Senate Bill #93, enacted by the 70th General Assembly, under Section 202.610, seems to clearly indicate that the Division of Mental Diseases, subject to the availability of suitable accommodations, shall receive any mentally deficient person whose admission is applied for under Section 211.201, RSMo.

"Inasmuch as Senate Bill #93 was enacted subsequently to Senate Bill #15, it would appear to me that Senate Bill #93 would, therefore, take precedence over Senate Bill #15 with regard to the admission of such patients being dependent on 'the availability of suitable accommodations.'"

Section 211.201, VAMS, pocket parts, Laws of Missouri, 1957, page 642, subsection 1 provides:

"When a child coming under the jurisdiction of the juvenile court is found to be feeble-minded, epileptic, mentally defective or

Honorable Addison M. Duval, M. D.

otherwise mentally disordered, the juvenile court may commit the child to the Missouri State School, the St. Louis training school or other state hospital or institution under such condition, as the court may prescribe and the order of commitment shall be binding upon the hospital or institution to which the child is committed."

Section 202.595, VAMS, pocket parts, Laws Missouri, 1959, Senate Bill 93, Section 202.610 provides as follows:

"The division of mental diseases, subject to the availability of suitable accommodations, shall receive for diagnosis, care, training and treatment in a state school and hospital any mentally deficient person whose admission is applied for under any of the following procedures:

- (1) Institutionalization on medical certification.
- (2) Institutionalization on application of a court of record; or
- (3) Institutionalization on court order as provided in section 211.201, RSMo."

It is a cardinal rule of construction of statutes that where there are two acts on one subject the rule is to give effect to both acts if possible, but if they are repugnant in any of their provisions, the latest act in time of passage controls. State ex rel. Taylor v. American Insurance Co., 200 SW2d 1, 355 Mo. 1053.

It seems clear under the statutes as now written that children committed to a State school for mentally deficient persons under the provisions of Section 211.201, VAMS, supra, are to be accepted subject to the availability of suitable accommodations in the school as provided in Section 202.595, supra.

CONCLUSION

It is our opinion that children committed to a state school for mentally deficient persons by a juvenile court under Section 211.201, supra, shall be accepted by the school subject to the

Honorable Addison M. Duval, M. D.

availability of suitable accommodations in the school as provided in Section 202.595, supra.

The foregoing opinion, which I hereby approve, was prepared by my assistant, A. M. Mansur.

Yours very truly,

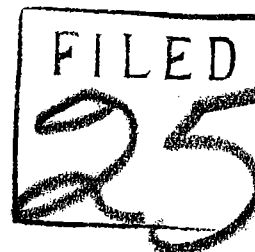
Thomas F. Eagleton
Attorney General

AMM:ar:aw

IMMUNITY OF STATE FROM SUIT:
STATE HOSPITALS:
DIVISION OF MENTAL DISEASES:

The State of Missouri is not liable or subject to suit for damages when personal property of employees at state mental hospitals is stolen or damaged by state hospital patients.

September 5, 1961



Dr. Addison M. Duval, Director,
Division of Mental Diseases,
722 Jefferson Street,
Jefferson City, Missouri

Dear Dr. Duval:

The following opinion is rendered in reply to your inquiry, which reads as follows:

"For the past several years, questions have been raised by our institutions relative to the liability of the State for personal property of employees stolen or damaged by acts of hospital patients. We would therefore appreciate it very much if you would give us a formal opinion regarding this matter so that we may properly advise employees of this Division."

Your request in essence raises the question as to whether the State of Missouri is immune from suit when personal property of employees is stolen or damaged by State Hospital patients. The ~~general~~ doctrine of the immunity of the sovereign state and its agencies is well settled. In 49 Am. Jur. §73, p.284, it states as follows:

"The liability of a state in its ordinary affairs is somewhat different from that of a private individual. Under ordinary circumstances, it can sustain a liability only by reason of a contractual obligation. It is not liable for the tortious acts of its officers. And where a governmental duty rests upon a state or any of its instrumentalities, there is absolute immunity in respect to all acts or agencies. There is no moral obligation upon the part of the state which can be enforced upon equitable principles alone. The state is not liable as an individual or private corporation may be on the ground that its agent acted upon an apparent authority which was not real.

Dr. Addison M. Duval

It is not bound to compensate an individual employee for injuries sustained while in its service, and no right of recovery in favor of such employee exists by inference or legal construction, or otherwise than by statute. It is not the policy of states to indemnify persons for loss, either from lack of proper laws or administrative provisions, or from inadequate enforcement of laws or the inefficient administration of provisions which have been made for the protection of persons and property. It has been held that a state is not liable for injury to private property by animals which it imports or attempts to protect by statute, whether the statute is constitutional or not. It is fundamental, however, that a state acting through the legislature has the power to recognize claims against it founded on justice and equity for which, by reason of the sovereign character of the state, it would otherwise not be liable, and on proper occasions should do so. Thus, while the state is not liable in tort for the acts of its officers, agents, or servants, it may assume such liability by statute, in the absence of any prohibition in the Constitution of the state. The state may recognize liability for payment of moral or equitable obligations, when not restricted by constitutional limitations, and the legislature may properly appropriate public funds for the payment thereof.

"The state can adopt whatever mode or method it elects to determine whether it shall become liable and discharge a given obligation. It can select whatever agency it sees fit and proper to pass upon the question, and provide that upon the determination of such agency, the claim shall be paid; and the inquiry conducted by such agency may be administrative or judicial, as the legislature elects."

The Missouri courts seem to be in agreement as to the immunity of the state from suit. In the case of *Hinds v. City of Hannibal*, 212 S. W. 2d 402, the Supreme Court said:

Dr. Addison M. Duval

"Immunity from tort liability for acts of public officers in the exercise of governmental functions is not retained in this country to perpetuate the idea that the king can do no wrong, as plaintiff suggests. The principal reason for it is that the general rules of respondeat superior cannot be applied to public officers without opening up unlimited possibilities for wasteful and dishonest dissipation of public funds. *Brown v. City of Craig*, 350 Mo. 836, 168 S.W. 2d 1080. Public funds are trust funds and public policy does not permit them to be diverted from the purposes for which they are raised by taxation. This is analogous to the rule which exempts charitable trusts from tort liability. See *Dille v. St. Luke's Hospital*, Mo. Sup., 196 S. W. 2d 615 and cases cited. Any change in this situation must be made by the Legislature, as has been done in providing for tort claims against other states and the Federal Government, because only the Legislature could prescribe all regulations and limitations necessary to protect the public interest and provide the fiscal basis for payment of such claims."

This case is entirely consistent with earlier Missouri cases. In *Zoll v. St. Louis County*, 124 S. W. (2d) 1168, the Court stated:

"The courts of this state have consistently held that, absent consent of the state, its agencies cannot be sued in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in *Hannon v. St. Louis County*, supra (62 Mo. 313) . . . It is the prerogative of the state to determine when suit may be maintained against it or its agencies and when not."

An opinion of this office dated June 18, 1951, discussed the question of whether the state is liable in damages for the wrongful acts of inmates of a state maintained training school for the care and treatment of feeble-minded and epileptic patients. We believe that opinion is entirely consistent with the opinion rendered herein and we are enclosing a copy of that opinion for your convenience and information.

Dr. Addison M. Duval

CONCLUSION

It is therefore our conclusion that the State of Missouri is not liable or subject to suit for damages when personal property of employees at the state mental hospitals is stolen or damaged by state hospital patients.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Clyde Burch.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CS:gm;mw

Enc.

COUNTY BUDGET
COUNTY BUDGET LAW:
COUNTIES
COUNTY COURT:

County Court of third Class county may expend funds not otherwise allocated out of class 5 of annual budget for the acquisition, storage and distribution of surplus agricultural commodities under a program authorized by Senate Bill 143, 71st General Assembly; if funds in Class 5 are insufficient, county court may supplement financing with Class 6 funds, as long as there is cash on hand in excess of funds already encumbered and amounts allocated to Classes 1 to 5.

May 19, 1961

Honorable Joe R. Ellis
Prosecuting Attorney
Barry County
Cassville, Missouri



Dear Mr. Ellis:

This department is in receipt of your request for our official opinion which reads as follows:

"Barry County is a third class County. The County Court of Barry County has been asked to enter into an agreement with the State Department of Public Health and Welfare, Division of Welfare, concerning the receipt, storage, distribution and accounting of commodities furnished by the United States Department of Agriculture in connection with a program for the disposal of Surplus commodities to needy citizens instituted by the Federal Government.

"In order to carry out this program the Court must hire the necessary personnel, rent the necessary storage space and meet the other financial requirements that will result from this program.

"The County Court has not budgeted for this program, having had no knowledge of it, prior to the formation of their budget for 1961.

"My question is as follows: Can the County Court of Barry County take from the General Revenue fund, of the County, the necessary funds to institute and carry out the program described above?"

Senate Bill No. 143, 71st General Assembly, was signed by the Governor on April 10, 1961. Due to the fact that this bill contained an emergency clause it is presently in effect. It reads as follows:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Any county or any city not within a county may establish a program for the acquisition, storage and distribution of surplus agricultural commodities to needy persons pursuant to acts of the congress of the United States, and may rent, lease or otherwise provide the necessary storage and distribution facilities therefor. The county or city may enter into contracts or agreement with any other county or city not within a county for the establishment and operation of a joint program or for the joint use of facilities or services.

Section 2. The director of the division of welfare of the department of public health and welfare shall make and promulgate necessary and reasonable regulations for the administration of the programs established pursuant to section 1, and for the certification of the eligibility of recipients of the commodities.

Section 3. The division of welfare of the department of public health and welfare shall, on or about the fifteenth day of each month reimburse any county or city not within a county in an amount equal to fifty per cent of the sum expended by the county or city for the acquisition, warehousing and necessary cold storage, safekeeping, maintenance of proper records and distribution of surplus agricultural commodities during the preceding month; provided the expenditures have been approved by the division of welfare.

Section 4. The provisions of this act shall expire two years from the effective date of this act.

Section 5. Because of the present economic conditions and because of the prevalent need for surplus agricultural commodities which the government of the United States is making available for distribution, this act is necessary for the immediate preservation and advancement of the health, safety and public welfare of the state, and an emergency is declared to exist within the meaning of the constitution and this act shall be in full force and effect from and after its passage and approval."

This bill clearly authorizes the expenditure of county funds to carry out the program for which provision is made therein. The question raised by you relates to the source of the funds in view of the fact that no express provision for such expenditures was made in the county budget for the current year.

The pertinent statutory provisions, applicable to county budgets in third and fourth class counties, are contained in Section 50.680, RSMo 1959, which reads in part as follows:

"Classification of proposed expenditures --
the court shall classify proposed expenditures
in the following order"

* * * * *

Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes one, two, three, four to class five to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose; provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class six."

As stated above, Senate Bill 143 became law on April 10, 1961, The 1961 budget of Barry County was approved by the county court on January 23, 1961. Since the program in question was not authorized until after the county budget was prepared, any expenditure for this purpose obviously is of an emergency or contingent nature, and it is our opinion that, under any interpretation of the statutory provisions relating to class 5, funds in Class 5 which are not allocated for other purposes may be used for this

purpose. In this connection we direct attention to the case of Everett v. County of Clinton (Mo. Sup. 1955) 282 S.W. 2d 30. In that case the county court had contracted for the purchase of road machinery, and was paying for it from Class 5 funds. The court had known that the county's old road machinery needed replacement but had not budgeted for the new machinery. There were ample unallocated funds in Class 5 to make the payments. The court held that the cost of the new machinery was a contingent expense and that Class 5 funds could be used to pay for the new machinery.

If a county has not provided enough money in Class 5 to defray all of the expenses incurred in connection with the surplus commodities plan, any amount in Class 6 of the county budget may be expended for this purpose. As authority for this proposition we direct attention to State v. Cribb (1954), 273 S.W. 2d 246, where the Supreme Court of Missouri stated (l.c. 273 S.W. 2d 249):

" * * * [3-5] It will be noted that the funds assigned to Class 6 may be expended with certain restrictions for 'any lawful purpose'. (Emphasis ours) One of the restrictions imposed is that 'there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; * * *'. In other words, the funds in Class 6 may not be depleted unless the funds in the other classes are sufficient to pay all claims contracted to be paid out of the funds in such classes. The intention of the Legislature, as evidenced by the provisions supra, established Class 6 somewhat as a guarantee that all claims in the preceding classes shall be paid. It is common knowledge that unforeseen events often occur which require expenditures in excess of the amount assigned to a certain class such as Class 3, the bridge and road fund. If the budget for such class is not sufficient to take care of the unforeseen expense, the county court may use money in Class 6, provided there is a sufficient sum in that class that is not subject to the restrictions mentioned in the statute. It is apparent that that was done in this case when it became evident that Class 3 expenditures might exceed the sum allocated to that class by the budget."

Under this case, the county court may supplement the financing of the surplus food plan from Class 6 funds, if the county has enough cash on hand to pay all existing obligations and all items budgeted in Classes 1 through 5.

CONCLUSION

It is the opinion of this department that a county court of a third class county may use funds in Class 5 of its annual budget,

which are not allocated for other purposes, to pay for the acquisition, storage and distribution of surplus agricultural commodities to needy persons under a program authorized by Senate Bill No. 143, 71st General Assembly. It is further our opinion that, if the funds provided in Class 5 are insufficient to meet all the expenses incurred under this plan, Class 6 funds may be used, as long as there is cash on hand in excess of funds already encumbered and amounts allocated to Classes 1 to 5.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

BE:ms

Encls
James Paul 7-8-59
Robert L. Lamar - 9-29-55-

MAGISTRATE COURT:
CHANGE OF VENUE:
BAIL BOND:

Upon a change of venue to a circuit court or to another magistrate court, a cash bond previously posted remains in effect, obviating the necessity for a new bond to insure the defendant's presence in the transfer court.

March 9, 1961



Honorable William J. Esely
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This is in response to your request for an opinion dated January 18, 1961, which reads as follows:

"I have been asked to obtain an opinion from you on the problem presented by the following circumstances:

"In a traffic case transferred by the Magistrate to Circuit Court where a cash bond has been set and posted; on a change of venue to another county what procedure is involved in regard to the said cash bond? Is the cash bond sent to the other county or is a new one necessary which would be ordered in the second county?

"Your attention to this matter will be appreciated."

Although not stated in your request, it will be assumed that the transfer to a circuit court and the change of venue to another county referred to therein are those contemplated by Section 517.520 RSMo 1949; which provides as follows:

"1. Upon the filing of the affidavit in due time, requesting change of venue, the magistrate must allow the change of venue and enter an order accordingly, and immediately transmit all of the original papers and a transcript of all of his orders in the case to some competent magistrate in the county, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that another magistrate in the county is a material witness for him

Honorable William J. Esely

without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, in which case, or in the event there is no other magistrate in the county, the case shall be certified to the circuit court for trial as if originally filed in the circuit court.

"2. In which case the receiving court or magistrate shall be notified immediately by the magistrate granting the change of venue, by filing with the clerk of the circuit court or magistrate receiving the case on change of venue a certified copy of the order granting the change of venue, and upon receipt of such notice such magistrate or clerk of the circuit court to whom the change of venue is granted shall reset the case for trial on a day certain.

"3. If the change be allowed on account of bias or prejudice of the inhabitants of the county, all of the original papers and such transcript immediately shall be sent to a magistrate of some adjoining county for trial as herein provided: provided, that when such affidavit for change of venue shall be filed, the magistrate shall have no further jurisdiction in the cause except to grant such change of venue. (L. 1945. p. 765 §77)."

The foregoing statute was tested in State ex rel Bone v. Adams, (Mo. Sup. 1956) 291 SW2d 74. In that case, there was a change of venue from a magistrate court to a circuit court under the provisions of Section 517.520. However, the circuit judge refused to accept jurisdiction on the grounds that Supreme Court Rule 11.05 was in conflict with that section, thus abrogating it. (Rule 11.05 provides that the Supreme Court may temporarily transfer circuit, probate, or magistrate judges to magistrate or probate courts.)

After holding that Section 517.520 was a lawful exercise of legislative authority and that it was not in conflict with any constitutional provision, the Supreme Court stated; l.c. 77:

"Section 517.520 covers a specific situation of change of venue as a matter of right on application of a party; Rule 11.05 covers all discretionary transfers of judicial personnel as the interest of justice requires. Whatever our power may be to provide mandatory methods and procedure for change of judge for cause on application of a party, in magistrate courts, we have not undertaken to exercise it and thus the only method and procedure therefor is that provided by Sections 517.510 and 517.520."

Honorable William J. Esely

Supreme Court Rule 22.05 implements and facilitates Section 517.520 in the following language:

"The defendant shall be entitled to a change of venue in a misdemeanor case pending in a magistrate court if he shall, before the jury is sworn or the trial is commenced, file an affidavit that he cannot have a fair and impartial trial by reason of the interest or prejudice of the inhabitants of the county. Upon the filing of such affidavit, the procedure provided for change of venue from magistrate courts in civil cases shall be followed."

When the change of venue is allowed, "all of the original papers and a transcript of all * * * orders" are transmitted to the receiving court, and the magistrate court losing the case has no further jurisdiction * * except to grant such change," Section 517.520, supra. (emphasis supplied). This would seem to indicate that the proper procedure with relation to a cash bond previously posted with the losing magistrate would be to transmit it with the rest of the documents pertaining to the case to the transfer court. Moreover, Supreme Court Rule 32.12 provides in part that "If there is a breach of condition of a bond, the court in which a criminal case is then pending shall declare a forfeiture of the bail." (emphasis supplied). Thus, it would appear that when the breach occurs, the proper court to act on it is the one which has jurisdiction at that time. If a new bond always became necessary upon a change of venue, there would have been no reason for the Supreme Court to have employed the word emphasized in the above quotation.

Although Section 543.170, RSMo 1949, provides that, upon a change of venue from a magistrate court, a recognizance will be required to insure the defendant's appearance before the transfer court, Supreme Court Rule 22.06 provides that such a recognizance will be required "if the defendant has not previously been admitted to bail." Compare Supreme Court Rule 30.07. The clear implication is, of course, that where the defendant is free on bail when the change occurs no new recognizance is necessary. Having been promulgated subsequent to the cited statute, the implementing rule governs in any conflict between the two, State ex rel Bone v. Adams, supra, 77, if indeed there is a conflict herein.

Although there have been no Missouri cases on the specific question presented, In Re Moore (Mo. App. 1955), 282 SW 2d 856, discussed the effect of a bond given in a police court upon appeal to the Circuit Court of St. Louis County. The conditions of that bond made

Honorable William J. Esely

it returnable at the next term of the named circuit court. However, the defendant sought and received a change of venue of the appeal to the Circuit Court of Pike County, but failed to file a change of venue bond insuring his appearance in the transfer court. The Pike County Court affirmed and sentenced defendant to confinement. In holding that the defendant was lawfully incarcerated, the St. Louis Court of Appeals read into the appeal bond the provisions of Supreme Court Rule 22.13 which sets out as a condition of such bond that the defendant will submit himself to the circuit court "having jurisdiction thereof, either originally or upon a change of venue." (emphasis supplied).

Admittedly, the quoted rule applies to appellate procedure and is much more explicit as to what occurs on a change of venue than the rules and statutes with which we are concerned. However, a portion of that decision was devoted to the effect of Supreme Court Rule 30.07 and the interpretation given it by the Commissioner on his initial hearing of the case. The Commissioner's declarations of law concerning Rule 30.07 contain the portions of the rule applicable to the instant question, as well as his interpretation of its effect, and are set out below:

" (9) Prior to the adoption of supreme court rules 22.13 and 30.07, in cases where defendant was not in custody at the time the change of venue was granted, and where defendant did not voluntarily appear in the transfer court, jurisdiction of the person was not transferred by the order changing the venue. Under such circumstances, in order that jurisdiction of the person be conferred upon the transfer court, it was necessary for the defendant to enter into the recognizance provided for in § 545.540, RSMo 1949 V.A.M.S."

" (11) Supreme court rule 30.08 supplants §§ 545.520, 545.530 and 545.540, RSMo., 1949 V.A.M.S. by the terms of the latter sections it was provided that upon the making of the order changing the venue the defendant "shall enter" into a recognizance for his appearance at the next term of the transfer court, and further provided that no order of transfer shall be effectual unless such bail be given. Under rule 30.07, however, it is provided that upon the making of the order changing the venue defendant "shall be entitled" to be admitted to bail "if the defendant has not previously been admitted to bail," and further provides that no order of transfer shall be effectual unless defendant

Honorable William J. Esely

"has been admitted to bail upon a satisfactory bond which has been filed in record with the clerk of the court," " In Re Moore, supra, 858, 859.

In affirming the above quoted declarations, the St. Louis Court of Appeals recognized a "new concept" * * * and a new procedure" resulting "from the operation of, Supreme Court Rules 22.13 and 30.07," l.c. 859. In summing up its discussion of 30.07, the court stated at 860, "By its broad and general terms rule 30.07 refers to and includes all previous admissions to bail, whether by order of the police, magistrate or circuit court."

Although Supreme Court rules of the "30 series" apply to change of venue in circuit courts, the similarity of the language of 30.07 to that employed in 22.06 fully warrants reliance upon the Moore case with respect to its holding that the original bond retains its effect after a change of venue. In these premises, it is submitted that the ordering of a new bond by the transfer court, though not improper, would be completely unnecessary.

CONCLUSION

It is the opinion of this office that where there is a change of venue from a magistrate court in a misdemeanor case to either a circuit court or another magistrate court, a cash bond posted in the court originally having jurisdiction may properly be forwarded to the transfer court, and will serve to compel the appearance of the defendant therein.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:cr

Opinion #388 answered by this letter.

November 15, 1961



Honorable Lynn M. Ewing, Jr.
Member, Missouri House of Representatives
223 1/2 W. Cherry Street
Nevada, Missouri

Dear Mr. Ewing:

This letter of advice is written in lieu of a formal opinion in answer to your inquiry of October 23, 1961.

The right to make the State a defendant in any suit is governed by a well recognized rule reflected in the following language from *State of Missouri v. Homesteaders Life Association*, 90 F. 2d 543, 1.c. 545:

"Generally, a state may sue or be sued only with its consent and in the manner provided by statute".

Section 71.015 RSMo 1959, cited in your letter with reference to annexation proceedings to be brought by the City of Nevada directs that a declaratory judgment action be brought within the scope of Chapter 527 RSMo 1959. If your action should in any way challenge the constitutionality of a statute, ordinance or franchise, Section 527.110 RSMo 1959 requires that the Attorney General of Missouri be served with a copy of the proceedings in order that he may be entitled to be heard. At such point the Attorney General will determine what action he will take under Section 27.060 RSMo 1959 which directs that "he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

It may also be noted that paragraph 3 of Section 71.015 RSMo 1959 directs that the class action be against the

Hon. Lynn M. Ewing, Jr.

-2-

November 15, 1961

"inhabitants" of the unincorporated area. A strained interpretation of that statute would be necessary to hold that the State of Missouri is an "inhabitant" of the unincorporated area due to the presence of State institutions in the area.

Under the circumstances it is recommended that the class action contemplated under our declaratory judgment law should not name the State of Missouri as a defendant. If the petition describes generally or specifically State property within the area to be annexed, this office will be in a position to exercise its authority under Section 27.060 RSMo 1959 to appear and interplead if necessary to protect the State's interests.

If, after considering this letter of advice, you still entertain doubts concerning proper procedures to employ in the premises, this office stands ready to assist you further in this matter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M:mc

SCHOOLS:
SUPERINTENDENT AS
TRANSPORTATION SUPERVISOR:
THIRD CLASS COUNTIES:
COMPENSATION WHEN PAID:

Section 167.220 R.S.Mo. 1959 requires
Treasurer of third class county to pay
amount of monthly compensation therein
provided to superintendent of schools of
county as supervisor of school transpor-
tation out of funds received from State of
Missouri for that purpose. Treasurer un-
authorized to make any such payments to
superintendent, as school transportation
supervisor, before receipt of funds for
that purpose from State of Missouri.

February 15, 1961

Honorable Charles B. Faulkner
Prosecuting Attorney
Lawrence County
Mount Vernon, Missouri



Dear Mr. Faulkner:

This office is in receipt of your recent request for a
legal opinion, which reads as follows:

"Will you please state your opinion in regard
to the above captioned statute in circumstances
where the State of Missouri has not forwarded
the funds to the County Treasurer for compensa-
tion to the County Superintendent.

"Our county treasurer has not received funds from
the State of Missouri as yet for compensation to
the County Superintendent for his duties as
supervisor of school transportation.

"I have stated to the County Court and Treasurer
that it was my opinion that the county, being
a third class county, would have no authority
for the payment of the above stated compensation
due to the fact it was contingent upon receipt
of same from the State of Missouri."

We understand the inquiry based upon the above mentioned
factual situation to be whether or not the Treasurer of the third
class county of Lawrence would be authorized, under provisions of
Section 167.220 R.S.Mo 1949, to pay compensation to the superin-
tendent of schools of such county for his services as supervisor
of school transportation, before the Treasurer has received funds
from the State of Missouri for that purpose.

Honorable Charles B. Faulkner

As to whether or not the answer to this inquiry will be in the affirmative or in the negative will depend upon the provisions of Section 167,220 R.S. Mo. 1959. Said section reads as follows:

"County superintendents-compensation for duties as supervisors of school transportation (class three counties).- County superintendents of schools in counties of the third class in this state shall be compensated for their duties as supervisors of school transportation in addition to the salary provided in section 167.210, as follows: In counties having less than seven thousand population, he shall receive three hundred and seventy-five dollars per annum; in those having seven thousand and less than ten thousand population, he shall receive four hundred and thirty-five dollars per annum; in those having ten thousand and less than twelve thousand population, he shall receive four hundred and ninety-five dollars per annum; in those having twelve thousand and less than fifteen thousand population, he shall receive five hundred and fifty-five dollars per annum; in those having fifteen thousand and less than twenty-five thousand population, he shall receive six hundred and fifteen dollars per annum; in those having twenty-five thousand and less than thirty-six thousand population, he shall receive six hundred and seventy-five dollars per annum; and in those having thirty-six thousand or more population, he shall receive seven hundred and thirty-five dollars per annum. The county treasurers of the several counties shall pay over such compensation monthly, out of funds received by said county treasurers from the State of Missouri for the purpose of compensating county superintendents of schools for their duties as supervisors of school transportation, at the same time he pays the county superintendent of schools his salary for the performance of his other duties."

Many Missouri decisions held that the right of a public officer to compensation must be founded upon a statute, which is strictly construed against the officer. Among such decisions so holding is the well known case of Nodaway County v. Kidder,

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129 S. W. 2d, 857, but here the court went a step further than usual, and in effect held that when a statute authorized payment of compensation to a public officer in a particular mode or manner, he was entitled to no further compensation or to be paid in a different mode or manner and that such statutes are strictly construed against the officer. At l.c. 860, the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656."
(Emphasis supplied.)

In view of the fact said section authorizes compensation to be paid such officer and then only in the amount applicable to third class counties of a certain population, and in a particular mode or manner, it is believed that in view of the holding in the Nodaway County case, the compensation of the superintendent of schools is a matter closely connected with the factual situation involved in the opinion request as well as the inquiry presented therein.

Said case is sufficient legal authority for the holding that the superintendent can be paid compensation for his services as supervisor of school transportation only in the mode or manner provided by Section 167.220.

CONCLUSION

Therefore, it is the opinion of this office that under the provisions of Section 167.220, R.S. Mo. 1959, the treasurer of a county of the third class shall pay the amount of monthly compensation therein provided to the superintendent of schools of such county for performance of his duties as supervisor of school transportation, out of funds received from the State of Missouri for that purpose. The treasurer lacks the power and is unauthorized to make any such payments to the superintendent of schools, as supervisor of school transportation, before receipt of funds for

Honorable Charles B. Faulkner

that purpose from the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

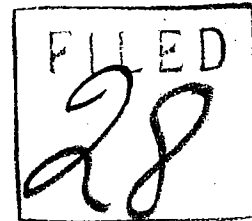
THOMAS F. EAGLETON
Attorney General

PNC:vm

STEALING:
CRIMINAL LAW:
BAILMENT:
TRUST RECEIPTS:
PROPERTY:

The possessor of property pursuant to a trust receipt executed by him can be prosecuted for stealing under Section 560.156 MRS 1959, if he converts said property in violation of the owner's title, possessory rights, or terms of the trust receipt.

March 22, 1961



Honorable Charles B. Faulkner
Prosecuting Attorney
County of Lawrence
Mount Vernon, Missouri

Dear Mr. Faulkner:

This is in reply to your letter of February 23, 1961, wherein you request an opinion as follows:

"Would you please state your opinion whether under a general trust agreement wherein the possessor of the goods and chattel delivers the trust receipt to the seller of the chattels, with the possessor of the chattels and goods agreeing to hold as trustees, and further agreeing to keep said chattel separate, to hold and exhibit for sale and to sell with the consent of the trustor, and to deliver proceeds either on demand or immediately after sale, and to deliver the chattels or goods immediately on demand, would come within the purview of Sec. 560.156 RSMo 1949, our Stealing Statute?

"After research, it is my opinion that since stealing refers to exercise and dominion over property in a manner inconsistent with the rights of the owner, and since Missouri regards a trust receipt as a bailment for sale or consignment, the chattel entrusted under such an agreement would be owned by the trustor, and the proceeds being owned by the same.

"Undoubtedly this agreement where breached either by the sale of the chattel without the consent of the trustor, or the disposal of the proceeds for the personal interests of the trustee without the consent of the trustor, would have come within

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the previous section 560.250 RSMo 1949 or 560.260 RSMo 1949, and hence it would be the Legislature's intent to now include these statutes in 560.156 RSMo 1949.

"At the present I have two agreements which have been breached, having similar provisions as outlined above. Possibly you have no further information than I. However, I will appreciate any comment on my opinion or any aid or information which you can render."

The initial question to be answered is the relationship of the parties to each other in such a transaction.

In Commercial Credit Co. v. Interstate Securities Co., 197 S.W. 2d 1000, plaintiff, a credit company, filed a replevin action against defendant for return of certain automobiles. Plaintiff had purchased the automobiles from the manufacturer, delivered them to dealer to sell, and received trust receipts from said dealer for the automobiles.

In finding for plaintiff, the court spelled out the relationship of the parties as follows, l.c. 1004:

"The decisions are not entirely in harmony as to the nature of trust receipts of the character involved in this proceeding, or their proper interpretation, whether they constitute conditional sales contracts, or, are, in their nature, chattel mortgages, or contracts of agency creating bailments. The holding in this state is that they are contracts creating bailments for sale and not in their nature chattel mortgages."

It is an elementary rule of law that in a bailment, title does not pass to the bailee, but remains in the bailor. As stated in 8 C.J.S., Bailments, §20:

"After the creation of a bailment the bailor retains the general title to, ownership of, or property in, the subject matter of the bailment. Indeed there can be no transfer of ownership in a contract of bailment, since, if there is a transfer of ownership, it becomes a sale."

Honorable Charles B. Faulkner

See also Martin v. The Ashland Mill Co., 49 Mo. App. 23, 1.c. 28, wherein the court stated:

"If a bailment, the title to the wheat did not pass to the defendant because a contract of bailment contemplates the return of the goods bailed or growing out of the necessities of commerce, as, where grain is delivered in store, other grain of like quality and grade may be returned in its stead. Nor does the mere fact that it was mixed with a mass of like quality with the knowledge of the bailor convert that into a sale which was originally a bailment."

In order for a bailee to be liable to the bailor, there must be a conversion of the bailed property by the bailee. As stated in State v. Wilcox, 179 S.W. 479, loc. cit. 481:

"****conversion is any dealing with the property of another which excludes the owner's dominion."

This "conversion" may be committed in two ways, which are set forth in 6 American Jurisprudence, Bailments, Section 150, page 276:

- "(1) by acts in derogation of the bailor's title; and
- (2) by acts in derogation of the bailor's possessory rights****More specifically, conversion of property by a bailee may be committed by using or dealing with the property in a way unauthorized by the terms of the bailment and in defiance of derogation of the owner's title, by an attempted sale or transfer of the property, by delivering it to someone other than the bailor or owner in violation of the terms of the bailment and in derogation of the bailor's rights to the possession, or by failing or refusing to redeliver to the bailor at the expiration or completion of the bailment."

Pursuant to Section 560.260, MRS 1949, such an individual would have been guilty of the crime of embezzlement by bailee.

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However, this section was repealed in 1955, and replaced by Section 560.156, MSRA 1959. "Stealing". (Laws 1955, p. 107).

The scope and effect of Section 560.156 was determined by the Supreme Court in State v. Zammar, 305 S.W. 2d 441, loc. cit. 445:

"The real purpose of the statute was to eliminate technical distinctions between the offenses of larceny, embezzlement and obtaining money under false pretenses*****".

See also State v. Woolrey, 324 S.W. 2d. 753.

Under Section 560.156, MRS 1959, "Stealing" is defined as follows:

"'Steal', to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property."

It thus follows that a bailee who converts the property of his bailor is guilty of the crime of stealing within the definition as set forth in MRS 1959, Section 560.156.

Thus, a possessor of property, who has given a trust receipt for same, and who converts said property in derogation of the owner's title, possessory rights, or contrary to the terms of said trust receipt, can be prosecuted for the crime of Stealing under Section 560.156, MRS 1959.

CONCLUSION

The possessor of property pursuant to a trust receipt executed by him can be prosecuted for stealing under Section 560.156, MRS 1959, if he converts said property in violation of the owner's title, possessory rights, or terms of the trust receipt.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD:vm

SENATORIAL REDISTRICTING
COMMISSION:

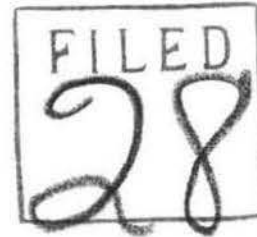
The commission must file its report not later than August 14, 1961. If state senatorial reapportionment is properly accom-

plished this year, the result will be (1) that the present senators will serve the balance of their present terms, through 1962 or 1964, depending upon whether they were elected in 1958 or 1960, (2) that senators will be elected in 1962 from the new even-numbered districts, (3) that senators will be elected in 1964 from the new odd-numbered districts, and (4) the senate in 1963 and 1964 will consist of the senators elected in 1960 from the old odd-numbered districts and those elected in 1962 from the new even-numbered districts.

June 30, 1961

Honorable James W. Farley
Senatorial Redistricting Commission
Farley, Missouri

Dear Mr. Farley:



We are in receipt of your letter dated June 16, 1961, requesting an answer to the following questions:

"1. What is the last date on which the report of the Senatorial Redistricting Commission can be filed? It is our understanding that the appointment of the commission was made by the Governor on February 15, 1961.

"2. Senators for the odd numbered districts were elected in 1960 and will be elected in 1964. The Senators for the even numbered districts will be elected in 1962. In the event a district bearing an odd number is renumbered with an even number or in the event an even numbered district is renumbered with an odd number, what effect will such action have upon incumbent senators and the date of the next election for such districts?

"3. In the event that a district now located outside of Jackson County, St. Louis County, or St. Louis City is relocated within said counties or cities, how long will the incumbent senator continue in (a) case of an odd numbered district (b) case of an even numbered district?

Honorable James W. Farley

"4. In the event that two incumbent senators reside in the same district after the new redistricting plan goes into effect, one who was elected in 1960 and one who was elected in 1958, which senator would represent the district and how long would each continue to serve? In the event that both were elected in 1960 or both were elected in 1958, how long would each continue to serve?"

The following provision of the Missouri State Constitution and RSMo 1959 appear to be applicable:

Article III, Missouri State Constitution.

"Section 7. Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall reapportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof.

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The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a reapportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such reapportionment shall be subject to the referendum."

"Section 11. The first election of senators and representatives under this Constitution, shall be held at the general election in the year one thousand nine hundred and forty-six when the whole number of representatives and the senators from the districts having even numbers, who shall compose the first class, shall be elected, and two years thereafter the whole number of representatives and the senators from districts having odd numbers, who shall compose the second class, shall be elected, and so on at each succeeding general election."

In regard to Question No. 1, it appears that Section 7, Article III of the present Missouri Constitution, as set out above, governs this question. Within sixty days after the population of this state is reported to the President for each decennial census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days after this sixty-day period, the governor shall appoint a commission

Honorable James W. Farley

of ten members, five from each list, to reapportion the thirty-four senators and their districts. This is the period of time fixed for the appointment of the commission, and the commission must complete its work and file its statement with the Secretary of State within six months after the expiration of this ninety-day period.

Records at the Bureau of the Census, Washington, D. C., indicate that the date on which the population of the state was reported to the President for the 1960 decennial census of the United States was November 15, 1960. February 13, 1961, was the last day of the above mentioned ninety-day period. Therefore the commission must finish its work and file its report within six months after February 13, 1961.

The terms "month" and "year" are defined in subsection (6) of Section 1.020, RSMo 1959, and the title and introduction of this section and the subsection in its entirety are as follows:

"1.020. Definitions - As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

(6) 'Month' and 'year'. 'Month' means a calendar month, and 'year' means a calendar year unless otherwise expressed, and is equivalent to the words 'year of our Lord'."

Additional Revised Statutes of Missouri, 1959, governing the computation of time are as follows:

"Section 1.040. Computation of time. The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday, it shall be excluded."

"Section 506.060, Subsection 1. In computing any period of time prescribed or allowed by this code, by order of court, or by any applicable statute, the day of the

Honorable James W. Farley

act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a legal holiday."

Section 1.040, RSMo 1959, is the basic computation of time statute in this state. It provides that the time within which an act is to be done shall be computed by excluding the first day and including the last. Subsection (6) of Section 1.020 defines the term "month." These sections are helpful in interpreting Section 7, of Article III, of our Constitution relative to time limits for the senatorial redistricting commission.

However, it may be pointed out that these are statutory enactments and that Section 1.020 itself uses the phraseology "as used in the statutory laws of this state," and that the problem before us is one of interpreting a constitutional provision. Even if this question is raised, by analogy, the labors of the senatorial redistricting commission are legislative in character.

The Supreme Court has held, in the case of *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, that the act of establishing senatorial districts, whether accomplished by the General Assembly or by some other group or body, is an exercise of legislative authority. The court said:

"That the districting of the state into legislative, senatorial, congressional, and judicial districts is the exercise of legislative authority cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the

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United States government. That authority is akin to and flows from the same power and authority that fixes the boundary lines of the state, and subdivides the state into counties, etc. Not only that, but the very same section of the Constitution which authorizes and empowers the Legislature proper to apportion and redistrict the state into senatorial districts also provides for and empowers this body of three state officials to redistrict it, in case the General Assembly neglects or fails to do so. That being true, and both deriving their authority from the same source, and performing precisely the same duties, it must stand to reason that, if the labors of the General Assembly are legislative, then the work of this body must also be legislative in character. We call the one an act of the General Assembly, the other the statement of the Miniature Legislature."

Since the function is legislative, the senatorial apportionment commission, as set up under the Constitution of 1945, must act in the exercise of a delegated legislative power. It seems logical that as a legislative authority it should be subject to the same rules as to computation of time as the state legislature and the statutory enactments of the state legislature. Also, these computation of time statutes were in force at the time the 1945 Constitution was drafted and it would seem that if the framers intended to be governed by a different method of computing time, they would have provided therefor. Scrutiny of the 1944 Constitutional Convention Debates reveals no discussion as to how the time should be computed in interpreting this section.

Text authorities generally favor the method provided in the Missouri statutes. Crawford, in his work, Statutory Construction, p. 166, states: "The general, as well as the sensible, rule is that the day, or the day on which the required act was performed, and from which the time is to be computed, shall be excluded, and the last day of the number constituting the required period shall be included. Any rule which includes the day on which the act is performed is fairly subject to criticism,

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unless the act is performed at the earliest possible moment of the day; otherwise, the computation starts before the act is performed."

If there is any further doubt in the matter the Supreme Court of Missouri in the case of State v. Atteberry, 300 S.W. 2d 806, has held generally that the constitution is subject to the same rules of interpretation and construction as other laws. The court stated:

"The constitution, in general, is subject to the same rules of construction as other laws, due regard being given to its broader scope and objects, as a charter of popular government, and the intent of the organic law is the primary object to be attained in construing it. State ex rel. Harry L. Hussman Refrigerator & Supply Co. v. City of St. Louis, 319 Mo. 497, 5 S.W.2d 1080, 1084 [4].* * *"

In the absence of evidence to the contrary, it appears that the computation of time provided for in Section 7 of Article III of our Constitution should be made on the same basis as that provided for in the general laws of this state. Therefore it would appear that the commission must finish its work and file its report within six months after February 13, 1961.

We believe that your questions numbered (2), (3), and (4), are answered in a letter dated May 25, 1961, from this office and which we quote from as follows:

"Assuming that reapportionment of the state senators and the numbers of their districts is accomplished this year in accordance with Article III, Section 7, Constitution of Missouri, the results, under the above mentioned constitutional provisions, will be (1) that the present senators will serve the balance of their present terms, i.e., through 1962 or 1964, depending upon whether they were elected in 1958 or 1960, (2) that senators will be elected in 1962 from the new even-numbered districts, (3) that senators will be elected in 1964 from the new odd-numbered districts, and (4) the senate in

Honorable James W. Farley

1963 and 1964 will consist of the senators elected in 1960 from the old odd-numbered districts and those elected in 1962 from the new even-numbered districts.

"This is the manner in which the pertinent constitutional provisions were construed, in practice, following the 1946 and 1951 reapportionments (see senate rosters in the Blue Book for 1947-48, pages 163-4, and the Blue Book for 1953-54, pages 173-4, and the footnotes thereto.)

"It may be noted that, depending upon how the matter is handled by your Commission, it is possible that in 1963 and 1964 there would be some new districts in which two or more senators resided and some new odd-numbered districts without senators. However, this is exactly what happened in 1947 and 1948; and, while relatively minor changes were made in the 1951 reapportionment and we have not fully checked the facts, it is possible that the same thing occurred in 1953 and 1954 with respect to districts in St. Louis City, St. Louis County, or Jackson County.

"Now, to apply the foregoing to your specific question: Changes in the numbers of the districts would have no effect upon the present senators insofar as their present terms are concerned. On the other hand, such changes could be quite significant with respect to reelection. For example, assume that no change is made in a district which now has an even number except that it is given an odd number. The senator now representing the district would be up for reelection in 1962 but, with an odd number, the district would elect no senator that year, and the present senator would be out of the senate.

"Again, for example, assume that no change is made in a district which now has an odd number except that it is given an even number. The term of the senator now representing the district would run through 1964. However, with an even number, the district would elect another senator in 1962,

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and there would be no senator to be elected in the district in 1964, so the present senator would be out of the senate at the end of his present term.

"Since renumbering may be combined with changes in district lines, and the places of residence of the present senators may also be factor, there are a wide variety of situations which may arise and it is impossible for us to go into all conceivable ramifications of this problem. However, the numbering of the districts is quite important not only from the standpoint of the present senators but, also, with respect to proper representation of various portions of the state in the senate in 1963 and 1964; and we hope that our comments above will help you in determining the effect of various plans for reapportionment which may be considered."

Reference to the 1944 Constitutional Convention Debates indicates the above analysis is correct. At p. 4287, we note the following discussion:

"Mr. Phillips: Now, I notice that in the Constitution of 1865 they first established this rule of classification of Senators. Now, in that Constitution they declared all of the offices vacant so that you had an entirely new election of Senators at the first election and elected your Senators, some for two years and some for four years. Now, as I understand it, this follows the rule in 1875.

"Mr. McReynolds: That's right.

"Mr. Phillips: And the practical effect of it is that the senators who were elected in 1942 will stay over. They will hold over. Is that correct?

"Mr. McReynolds: Well, that is the purpose of it as it was written.

Honorable James W. Farley

"Mr. Phillips: Yes, until 1946, and then in their districts seventeen Senators will be elected?

"Mr. McReynolds: That's correct.

"Mr. Phillips: In '46. Now, then, at this election this fall there are seventeen Senators running for terms of four years?

"Mr. McReynolds: Yes, sir.

"Mr. Phillips: And their terms will expire in '48 so that these Senators who are running will be holdover Senators under this provision. Is that correct?

"Mr. McReynolds: That's correct.

"Mr. Phillips: And they run at their peril as to their districts being changed by the Redistricting Commission. Is that correct?

"Mr. McReynolds: That's correct."

Conclusion

It is our conclusion that the commission must file its report not later than August 14, 1961. If state senatorial reapportionment is properly accomplished this year the result will be (1) that the present senators will serve the balance of their present terms, through 1962 or 1964, depending upon whether they were elected in 1958 or 1960, (2) that senators will be elected in 1962 from the new even-numbered districts, (3) that senators will be elected in 1964 from the new odd-numbered districts, and (4) the senate in 1963 and 1964 will consist of the senators elected in 1960 from the old odd-numbered districts and those elected in 1962 from the new even-numbered districts.

The foregoing opinion which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CB:gm

SCHOOLS:
SCHOOL DISTRICTS:
COUNTY COURTS:

Land in Howell County is not "unorganized"
territory and county court therefore cannot
place it in another school district.

July 26, 1961



Honorable Patrick O. Freeman, Jr.
Prosecuting Attorney
Oregon County
Alton, Missouri

Honorable Harold Henry
Prosecuting Attorney
Howell County
West Plains, Missouri

Gentlemen:

This is in answer to your joint request for an opinion dated April 4, 1961, on the basis of the facts presented in your letter as follows:

"Oregon County, Missouri, lies adjacent to Howell County, Missouri on the west. R-3 School District was re-organized in the year 1951 and approved by the voters and by the Department of Education of the state of Missouri.

"R-3 School District of Oregon and Howell Counties, Missouri, consists of land in Oregon County, Missouri and a lesser portion in Howell County, Missouri, and the principal school buildings thereof are located in Koshkonong in Oregon County.

"Prior to April 21, 1920, the E 1/2 of Section 15, Township 23, Range 7 in Howell County, Missouri, was a part of consolidated district #1 of Howell County.

"Prior to April 21, 1920, the East Half (E 1/2) of Sections twenty-two (22) and twenty-seven (27) of Township twenty-three (23), Range seven (7), in Howell County, Missouri was part of school district #93 of Howell County, Missouri.

Honorable Patrick O. Freeman, Jr.
Honorable Harold Henry

"On April 21, 1920, at an annual school meeting a school election was held in Howell County in consolidated district #1, district #93, and district #78 for the purpose of detaching the East Half (E 1/2) of Section fifteen (15) of consolidated district #1 and detaching the East Half (E 1/2) of sections twenty-two (22) and twenty-seven (27), from school district #93 and attaching said lands to school district #78.

"The above proposition carried in district #78 but was defeated in consolidated district #1 and district #93. Apparently, immediately thereafter a Board of Arbitration was appointed to decide the issue and the following appears on the Plat Records of the school district of Howell County in the office of the County Clerk. There is no signature following this entry but appears to be in order and in proper sequence and which is as follows:

"Page No. 78

"At Annual School Meeting 1920 a Proposition was submitted to detach from Consolidated District One the East Half of Section 15 twp 23 R 7 and attach to Dist. 78; carried in District 78, defeated in Consolidated District. Board of Arbitration met at office of County Supt. April 21 - decided appeal in favor of plaintiff District 78 awarding such territory.

"At same meeting proposition was submitted to attach East Half of Section 22, and East half of Section 27, Twp 23 R 7, detaching same from District 93, - Proposition carried in District 78, defeated in Dist. 93 Appeal made by 78, and plaintiff district 78 awarded territory. 4/21/20

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"Sections One & Two added by vote Annual Meeting April 6, 1920. Also East 1/2 Sec. 15, East 1/2 Sec. 22, & East 1/2 27 added April - 1920 by action of Board of Arbitration at meeting April 21 1920.

"The Plat Records of school district #78 of Howell County evidence that the East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) thereafter were a part of school district #78 and apparently all of the students and citizens of the East Half (E 1/2) of Sections fifteen (15), twenty-two (22) and twenty-seven (27) from April of 1920 to 1951 attended school district #78 in Howell County.

"About March 13, 1951, an election for the re-organization of R-3 school district of Oregon and Howell Counties was held and approved by the voters and the Missouri Department of Education whereby school district #78 of Howell County became a part of Re-organized School District #3 of Oregon and Howell Counties. School district #78 which was annexed to R-3 of Oregon and Howell Counties included among other lands the East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) as aforesaid of Howell County. The re-organization of R-3 in 1951 appears to be in order and the school plat records of both Oregon and Howell Counties and all other records evidence that the East Half (E 1/2) of Sections fifteen (15), Twenty-two (22), and twenty-seven (27) are located in the R-3 school district of Oregon and Howell Counties, Missouri, from 1951 to date.

"Since 1951 the students from East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) have attended R-3 school district at Koshkonong, the citizens of East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) have participated in school

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elections and citizens from said sections have served on the school board as Directors of R-3. The tax collector of Howell County has from 1951 to date paid the school taxes collected by Howell County from the East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) to the Treasurer of R-3 School District of Oregon and Howell Counties.

"R-3 School District of Oregon and Howell Counties has outstanding school bonds which as aforesaid embrace as part of its district the East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27).

"Apparently since April 1920 there has been no question raised concerning the aforesaid findings of the arbitration committee, nor remonstrance by the citizens of the East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) of Howell County.

QUESTION

"Based upon the foregoing facts, is the East Half (E 1/2) of Sections fifteen (15), twenty-two (22), and twenty-seven (27) unorganized school territory as within the meaning of the term as used in Section 165.167 R.S. Missouri 1949?"

The question you asked arose out of a petition filed in the County Court of Howell County and recorded in Record Book T, page 413 and dated February 20, 1961, which petition was signed by six persons and the petition reads as follows:

"We, the undersigned taxpayers, qualified in accordance with Section 165.167 Public School Laws, State of Missouri, hereby respectfully request the County Court of Howell County, Missouri to make and duly record upon the Tax Books and other proper records of Howell County, an order pursuant to the provisions of said Section 165.167 and restore the East boundary line of the former Mt. Pleasant School District as pertains to land Section 15, 22, and 27.

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"And, we further petition the Court, that by virtue of said boundary restoration, same having been changed prior to this date, without proper recording, procedure, authorization or vote of record, that the land Sections affected be declared in the former Mt. Pleasant School District now consolidated and known on Howell County Books of Record, as Reorganized District 1."

On February 21, 1961, the following proceedings were had in the County Court of Howell County:

"Court now takes up the matter of acting on the petition presented by Art Gutfahr, Rt. #1, West Plains, Missouri, on February 20, 1961, requesting the County Court to annex the E 1/2 of land Sections 15, 22, & 27 Twp. 23 R. 7W to School District R-1, according to the provisions of Section 165.167, Missouri School Laws.

"Court voted unanimously in favor of the foregoing named petition and ordered the County Clerk to so change the boundary line of R-1 to include the E 1/2 of land Section 15, 22, & 27 in Twp. 23, Range 7 W."

Since your question and the above quoted petition and proceedings all mention Section 165.167 RSMo 1959, we quote said section:

"Whenever there shall be in this state any territory not organized into a common, town or city school district, and not containing within its limits twenty or more pupils of school age, any three or more taxpayers in such unorganized territory, or in any adjacent common, town or city school district, may file a written petition in the office of the clerk of the county court praying that such unorganized territory shall be attached to the nearest and most available common, town or city school district, and at the next meeting of the county court the said petition shall be taken up and heard by the court, which shall, after being duly informed and advised, make an order annexing such territory to the nearest and most available

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common, town or city school district, and thereupon such territory shall become a part of such district, which fact shall be duly entered by the proper officers upon the tax books and other records of the county."

Section 165.167 RSMo 1959 is the only section we are able to find which gives a county court any authority to attach territory to a school district or in any way change or modify the boundaries of any school district. In order for the county court of Howell County to change the boundary line of Reorganized District R-1 of Howell County to include the territory involved, as it purported to do in its order of February 21, 1961, it must be shown that the territory comes within the provisions of Section 165.167 RSMo 1959. There are two requirements in this section. One is that the territory contains less than twenty pupils and this requirement is not under consideration in the facts presented in this opinion. The other requirement is that the territory be "not organized into a common, town or city school district". The "unorganized territory" referred to by you in your question is the territory "not organized into a common, town or city school district". The common, town and city school districts are defined by Section 165.010 RSMo 1959 as follows:

"The public school districts organized under any of the laws of this state are hereby classified as follows:

"(1) All districts having only three directors are common school districts;

"(2) All districts outside of incorporated cities, towns and villages, which are governed by six directors are consolidated school districts;

"(3) All districts governed by six directors and in which is located any city of the fourth class, any city organized under a special charter which has less than one thousand inhabitants, or any town or village, are town school districts; and

"(4) All districts in which is located any city of the first, second or third class, or any city organized under a constitutional charter or under a special charter, which has one thousand but not

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Honorable Harold Henry

more than three hundred thousand inhabitants, are city school districts."

The primary question in this case is a question of fact and not of law, and the question is whether the facts show the territory involved was "unorganized territory" so as to bring it within the provisions of Section 165.167 RSMo 1959.

In considering the petition quoted above and filed in the office of the county clerk in Howell County on February 20, 1961, we conclude that this petition, on its face, does not show that the territory was unorganized territory. The petition requests the county court to "restore the East boundary line of the former Mt. Pleasant School District" and the petition requests an order of the court that the land affected "be declared in the former Mt. Pleasant School District". The petition makes no affirmative statement showing that the territory, at the present time, is "not organized into a common, town or city school district" so as to bring the territory within the provision of Section 165.167 RSMo 1959.

The order of the court on February 21, 1961, does not follow the petition in an attempt to "restore the East boundary line of the former Mt. Pleasant School District" and it is not an order that the land affected "be declared in the former Mt. Pleasant School District". The order speaks of the petition as a request "to annex" the land and it "ordered the county clerk to change the boundary line of R-1". Thus there is no finding that the territory in question was "not organized into a common, town or city school district" and the order does not attempt to "attach unorganized territory" to another school district under the provisions of Section 165.167 RSMo 1959.

From all of the facts presented in your opinion request, it is abundantly clear that the land in question has for many years been "organized into a common, town or city school district". Since the reorganization on March 13, 1951, this territory has been a part of Koshkonong Reorganized School District R-3 of Oregon County. This district is a town school district as defined in paragraph 3 of Section 165.010 RSMo 1959.

According to the facts presented in your opinion request, the territory in question was a part of School District No. 78 of Howell County from April 21, 1920 to the date of the reorganization on March 13, 1951. Prior to April 21, 1920, part of the land was in Consolidated District No. I of Howell County, and the remainder of the land was a part of Mt. Pleasant School

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District No. 93 of Howell County. Therefore, as far back as the records presented indicate, this territory has always been "organized into a common, town or city school district" because it has been a part of one school district or another for these many years. It is not "unorganized territory" and therefore does not come within the provisions of Section 165.167 RSMo 1959.

All of the maps, plats and records on file with the State Department of Education in reference to Koshkonong Reorganized School District R-3 of Oregon County and Reorganized School District R-1 of Howell County clearly and conclusively show that the territory in question is now a part of Koshkonong Reorganized School District R-3 of Oregon County, and has been a part thereof since the reorganization of that district. All of said records further show that the territory in question has never been a part of Reorganized School District R-1 of Howell County.

CONCLUSION

It is therefore the opinion of this office that the land in question has for many years been "organized into a common, town or city school district" and the land is therefore not "unorganized territory" and does not come within the provisions of Section 165.167 RSMo 1959.

The foregoing opinion which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WWW:aa

September 14, 1961



Honorable J. R. Fritz
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Fritz:

This is in response to your letter dated June 9, 1961, in which you request an opinion from this office. In your letter you ask the following question:

"Under Missouri R.S. 1959, Section 137.075, is a person who has tangible personal property in his physical possession as a consignee deemed to be 'holding' such property for the purposes of taxation?"

A member of my staff recently contacted you by telephone and during the conversation this matter was discussed. You expressed the view that you were desirous of obtaining a general statement of the law. At that time you were informed that as a rule of thumb the State Tax Commission operated upon the theory that a consignee is considered as "holding" real property or tangible personal property within the meaning of Section 137.075, RSMo 1959. This office renders legal advice to the State Tax Commission, therefore, it is the opinion of this office that if the owner of such property has not paid a tax on this property then the consignee would be liable for the payment of such tax.

In the event that you would like to obtain an official opinion from this office on this same subject matter then may I suggest that you specify in detail the person considered by you to be a consignee.

Yours very truly,

THOMAS F. EAGLETON

COUNTIES: County Judges of third and fourth class counties
COUNTY JUDGES: are not entitled to the increased per diem compensation
COUNTY OFFICERS: provided by House Bill 255, 71st General Assembly,
MILEAGE: but are entitled to the increased mileage allowance
therein provided.

October 24, 1961



Honorable J. R. Fritz
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Fritz:

We are in receipt of your recent request for an official opinion of this office which reads as follows:

"At the request of the County Court, Pettis County, Missouri, I submit to you for your opinion the question as to whether or not House Bill No. 255 enacted by the recent legislative session and signed by Governor Dalton permits the County Judges now in office to be paid at the increased rate during their present term, and also if County Judges presently holding office may receive the .10¢ per mile mileage allowance for travel both to and from work and otherwise during their present term of office."

House Bill No. 255, 71st General Assembly reads as follows:

"Section 1. Sections 49.110 and 49.120, RSMo 1959, are repealed and two new sections enacted in lieu thereof to be known as sections 49.110 and 49.120, to read as follows:

49.110. In all counties of the third class the judges of the county court shall receive for their services fifteen dollars per day for each of the first ten days in any month that they are necessarily engaged in

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holding court and shall receive ten dollars per day for each additional day in any month that they are necessarily engaged in holding court, and shall receive ten cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by the respective county judge, setting forth the number of miles necessarily traveled.

49.120. In all counties of the fourth class in this state, the judges of the county court shall receive for their services fifteen dollars per day for the first ten days they are necessarily engaged in holding court in each month and ten dollars per day for each day they are necessarily engaged in holding court thereafter in each month; and shall receive ten cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem herein fixed shall be paid at the end of each month and the mileage shall be paid at the end of each month upon the presentation of a bill, by each county judge, setting forth the number of miles necessarily traveled.

Sections 49.110 and 49.120 RSMo 1959 which were repealed and replaced by House Bill 255 read as follows:

Section 49.110-

"In all counties of the third class the judges of the county court shall receive for their services fifteen dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they are necessarily engaged in holding court, and shall receive seven cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court.

The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by the respective county judge, setting forth the number of miles necessarily traveled."

Section 49.120 -

"In all counties of the fourth class in this state, the judges of the county court shall receive for their services ten dollars per day for the first ten days they are necessarily engaged in holding court in each month and five dollars per day for each day they are necessarily engaged in holding court thereafter in each month; and shall receive seven cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court but mileage shall be charged only once for each regular term and shall not be charged over eight times per year for special or adjourned terms. The per diem herein fixed shall be paid at the end of each month and the mileage shall be paid at the end of each month upon presentation of a bill, by each county judge, setting forth the number of miles necessarily traveled."

We first direct your attention to the question of whether county judges of third and fourth class counties can receive the increased per diem compensation provided in the above bill.

Section 13 Article VII of the Missouri Constitution of 1945 reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It is clear that this constitutional provision prohibits county judges of third and fourth class counties from receiving the increased per diem compensation provided by House Bill 255 during their present term of office.

Does this constitutional provision also prohibit county judges of third and fourth class counties from receiving the increased mileage provided by House Bill 255? The answer to this question depends on whether the mileage allowance provided for is to be considered "compensation". Volume 67 CJS Officers, Section 91, page 330 reads in part as follows:

"In a limited sense, mileage may become a part of the compensation of an officer; if the mileage allowance is limited to the amount actually expended in traveling, it cannot add anything to the income of the recipient of the salary; but, if the mileage is not so limited, as where a certain amount is allowed for each mile traveled and this amount exceeds the actual mileage charged, the balance above such charge becomes a part of the official income or compensation."

The cases of *Reed v. Gallet* (1931) 50 Idaho 638, 299 P. 337 and *Marioneaux v. Cutler* (1907) 32 Utah 475, 91 P. 355 also expressed this principle.

The question then becomes whether the legislature intended the ten cent per mile allowance to be an allowance limited to the amount actually expended by the county judges in traveling or an allowance exceeding in amount the actual expenditure. We must look to the wording of the bill to determine the legislative intent. The bill speaks of the mileage allowance as "mileage compensation". We believe that this description does not indicate an intention that the allowance is to be in excess of what is actually expended, but rather approximates and is equivalent to reimbursement.

This view is further indicated because mileage is allowed under House Bill 255 only when the county judge involved has traveled in his own personal automobile. The repealed sections (Sections 49.110 and 49.120, RSMo 1959) had no such restriction. Under them it was possible for a county judge to receive a mileage allowance if he rode in the automobile of someone else. This likewise indicates an intention on the part of the legislature to provide for reimbursement of the judges for the traveling expenses actually incurred by them.

While it is conceivable that the amount allowed to a particular judge may sometimes be greater than his actual expenses in running his automobile, yet this does not mean that the mileage allowance is compensation. In the case of *Macon County v. Williams* (1920) 284 Mo. 447, 224 S.W. 835 the Missouri Supreme Court held that a flat allowance of \$1200.00 per year, given to circuit judges to cover their expenses in holding court, was not "compensation" within the meaning of the constitutional prohibition against increases in compensation.

Under the foregoing authorities and because of the above reasoning, it is the opinion of this office that the legislature intended the mileage allowance for county judges included in

Honorable J. R. Fritz

House Bill 255 to be a reimbursement for expenses actually incurred by them. Such allowance is not, therefore, compensation within the meaning of Section 13, Article VII of the Missouri Constitution.

CONCLUSION

County Judges of third and fourth class counties are not entitled to the increased per diem compensation provided by House Bill 255, 71st General Assembly, but are entitled to the increased mileage allowance therein provided.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RE:ms

COUNTY OFFICERS:
SHERIFFS:
MILEAGE:
FEES AND SALARIES:

Sheriffs are not entitled to a mileage allowance under Section 57.430, RSMo when assisting a sheriff of another county in a criminal investigation with which the first sheriff's county is not concerned.

December 28, 1961



Honorable Vance R. Frick
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Frick:

We are in receipt of your request for an opinion of this office which reads as follows:

"Today I was contacted by all three members of the Adair County Court concerning doubt in their minds as to the paying of certain mileage to the Adair County Sheriff. This being a third class county, the provision for sheriff's mileage is contained in Section 57.430 M.R.S. 1959.

The members of my county court have asked me to determine whether under the above sighted section the sheriff of this county is entitled to mileage for assisting the sheriff of another county in the apprehension of an escaped criminal in the other county or in looking for a subject who has committed a crime in another county when there are no charges filed against the individual in Adair County and he is not sought by the authorities of Adair County for Adair County.

I would appreciate your opinion with, if permissible, a copy of the same to the Adair County Court on the above question.

Honorable Vance R. Frick

I find no case law directly in point on this subject and feel that in your rendering of opinions you are probably in a better position to give an opinion on the same than myself."

Section 57.430, RSMo 1961, states in part as follows:

"1. In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed ten cents per mile and actual expenses not to exceed ten cents per mile for each mile traveled, the maximum amount allowable to be one hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote."

Does the underlined portion of the above quoted section entitle sheriffs to receive a mileage allowance from his county for aid he renders to a sheriff of another county, in regard to a criminal investigation with which his county is in no way concerned?

While the language above underlined, "in connection with the investigation of persons accused. . . of a criminal offense" is susceptible of a very broad construction yet the preceding qualifying words "official duties" greatly limit the language authorizing mileage pay for sheriffs. In order for a sheriff to be entitled to mileage under the circumstances outlined in your request, those circumstances must constitute the performance of his official duties. Hence a determination must be made of the meaning of official duties

Honorable Vance R. Frick

in connection with the investigation of persons accused of or convicted of a criminal offense. We are of the opinion that services performed by a sheriff in order to be of an official nature must pertain to the county in which he holds office.

In the case of State v. Owens (Mo. Sup. 1953) 258 S.W.2d 662, the Supreme Court of Missouri discussed the extent of the powers and duties of county sheriffs. Owen, a deputy sheriff in Taney County, had been convicted in Boone County of a violation of Section 564.610 of the Missouri Statutes. This Section made it unlawful to exhibit a deadly weapon in a rude, angry and threatening manner. It exempted from its provisions, however, sheriffs, deputy sheriffs and other specified people. The Court held that the exemption applied only when a sheriff or deputy sheriff was involved in the discharge of his official duties. In this connection the Court stated at 258 S.W. 2d 665:

"[2-4] The powers, authority and duties of sheriffs, and of emergency deputy sheriffs such as defendant, are limited primarily to the county of the sheriff's election, the county for which the deputy sheriff is commissioned * * * When in another county upon official business, which originates in the county of his election or appointment, a sheriff or his deputy clearly is entitled to the immunity of Section 564.610."

A similar statement may be found in Volume 80, C. J. S., Sheriffs and Constables, Section 36, page 205:

"As a general rule, however, [a sheriff's] authority, and the authority of a deputy sheriff appointed by him, are limited to his county."

Because of these authorities we have reached the above stated opinion that actions of a county sheriff, in order to constitute the performance of his "official duties" must relate in some way to the county in which he holds office. Since in the situation contained in your request the sheriff would be performing a function in no way related to his county, he would not be entitled to mileage under Section 57.430 RSMo 1961.

CONCLUSION

It is the opinion of this office that sheriffs are not entitled to a mileage allowance under Section 57.430 RSMo 1961, when

Honorable Vance R. Frick

assisting a sheriff of another county in a criminal investigation with which the first sheriff's county is not concerned.

The foregoing opinion, which I hereby approve, was prepared by my assistant Ben Ely, Jr.

Yours very truly,

THOMAS F. BAILEY
Attorney General

EE:ms:ca

October 5, 1961

32

Honorable J. Ben Garrett
Representative, Jefferson County
617 North Third Street
DeSoto, Missouri

Dear Mr. Garrett:

This is in answer to your letter of recent date regarding the question of the authority of the City of DeSoto to extend its water lines beyond the city limits.

We have ascertained from Mr. John Anderson, City Attorney of DeSoto, that DeSoto has a combined water works and sewerage system under the authority of Chapter 250, Revised Statutes of Missouri, 1959. Section 250.190, Revised Statutes of Missouri, 1959, provides as follows:

"Any such city, town or village or sewer district operating a sewerage system or a combined waterworks and sewerage system under this chapter shall have power to supply water services or sewerage services or both such services to premises situated outside its corporate boundaries and for that purpose to extend and improve its sewerage system or its combined waterworks and sewerage system. Rates charged for sewerage services or water services to premises outside the corporate boundaries may exceed those charged for such services to premises within the corporate limits."

It will be seen from the provisions of Section 250.190, supra, a city operating a combined waterworks and sewerage system has authority to supply water services to premises

Honorable J. Ben Garrett October 5, 1961

situated outside its boundaries and can extend for such purposes its sewerage system or its combined waterworks and sewerage system.

It is also provided in such section that the rates charged for water services to premises outside the corporate boundaries may exceed those charged for such services to premises within the corporate limits.

We believe that the provisions of such section answer the question contained in your letter.

With best personal regards, I am

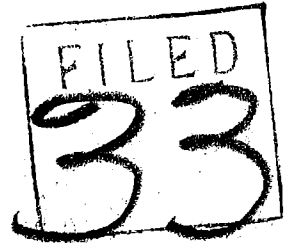
Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:BJ

INSURANCE: Contract Number 1515 negotiated by Duncan Funeral Homes is not on its face an insurance contract, but negotiating of the same in the light of language found in the letter of Duncan Funeral Homes, dated May 19, 1961, causes Contract Number 1515 to evidence an insurance contract, offered in violation of Secs. 375.300 and 375.310, RSMo 1959.

December 22, 1961



Honorable William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Gladden:

This opinion construes Contract No. 1515, dated May 9, 1961, between Duncan Funeral Homes and Firman Goforth, as the same is affected by the letter of Joe R. Duncan, dated May 19, 1961, addressed to Firman Goforth. The contract form and letter is reviewed with a view to determining if the same, in point of law, constitute the negotiation of an insurance contract in violation of Section 375.310, RSMo 1959, providing in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

We further view the contract and letter referred to in the preceding paragraph to determine if those who negotiate such agreement as agents are in violation of Section 375.300, RSMo 1959, reading as follows:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division

Honorable William E. Gladden

of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in insurance business, before such individuals, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

In order that no doubt will be entertained as to the complete provisions of Contract No. 1515, and the language found in the letter of May 19, 1961, addressed to Firman Goforth in relation to such contract, we here set forth the full text of such instruments:

Contract No. 1515 provides as follows:

"Number 1515

Amount \$ 400.00

PRE-ARRANGED FUNERAL CONTRACT

With

DUNCAN FUNERAL HOMES

Mountain View, Missouri

Birch Tree

Winona

Eminence Summerville

I hereby request the Duncan Funeral Home to take charge of the remains at the time of death, furnish their complete funeral services and conduct the funeral, all in accordance with the pre-arranged contract hereinafter set out, in the amount as herein stated.

"In consideration of the hereinafter set out contract, I hereby agree to pay the sum of \$ 400.00 in equal payments of \$ 9.00 per quarter hereafter until said sum is fully paid. Should the undersigned fail to make quarterly payments as set

Honorable William E. Gladden

out above, on the date specified, said agreement shall not become null and void by reason thereof and the undersigned shall be entitled to paid up funeral benefits in a sum equal to the full amount of all payments which have been paid, in merchandise only, through the Duncan Funeral Home.

"In consideration of the payment of \$ 9.00 and the payment of \$ 9.00 each quarter hereafter, the Duncan Funeral Home agrees in the event of the death of the Parties Listed below and in the event of full compliance with the terms of this contract, and provided the undersigned has paid the amount due provided for herein, to take charge of and conduct the funeral of Parties Listed, to furnish a Superior Quality Casket and their complete Funeral Services to the value herein stated."

NAME	Relation to Applicant	Age	Quarterly Payment	Amount of Contract
Firman Goforth	-----	80	\$ 9.00	\$ 400.00

"Free ambulance service will be furnished applicant within a radius of forty miles of the Duncan Funeral Home nearest you, not to exceed eighty miles in any twelve month period.

"In the event that the deceased has died a distance to excess of fifty miles of the nearest Duncan Funeral Home or that burial is to take place at a distance of more than fifty miles, a reasonable charge shall be made for travel in excess of fifty miles.

"All of the benefits and provisions of this agreement may inure to any member of the immediate family of the undersigned should such contingency arise, upon payment of the unpaid amount due under the contract.

"In the event legislation is passed forbidding contracts of pre-arrangement of funeral services, the total amount that has been paid by the undersigned will be used as a credit toward a funeral service, only when said services are purchased from the Duncan Funeral Home. In no event will payments be returned in cash.

"Nothing contained herein shall be construed as a policy of insurance whereby the Duncan Funeral Home agrees to pay any money under the terms of this contract.

Honorable William E. Gladden

"The undersigned hereby requests his or her next of kin, heirs, administrators, executors, or assign to immediately notify the Duncan Funeral Home, upon his or her death, in order that the Duncan Funeral Home may fulfill this mutual contract. Failure to so notify the Duncan Funeral Home renders re-arranged contract null and void."

"Dated this 9th day of May, 1961.

s/ Firman Goforth
Applicant's Name as it appears on Application

DUNCAN FUNERAL HOME

By s/ Joe R. Duncan

Witness: s/ John R. Duncan"

SUMMARY OF BY-LAWS AND REGULATIONS OF CONTRACT WITH
DUNCAN FUNERAL HOMES

"When the address of a member is changed, it shall be the duty of such member to at once notify the Duncan Funeral Home, of such change.

"The family of the deceased shall have the right to select the casket and funeral service to the amount designated in this certificate; and if they choose to do so, they may select a casket, service and, or, merchandise of greater value by arranging for payment in the difference. The complete funeral furnished under this contract shall be equal to or greater in value than that furnished for the amount provided in this contract, by other funeral homes complete funeral service and merchandise.

"Immediate notice of the death of the member named herein must be given to the Duncan Funeral Home, so it may take immediate charge and care of the remains and prepare same for funeral. The Duncan Funeral Home will not be liable for any expense incurred by the family of the deceased member, nor by any other person, nor will it be responsible to the family of the deceased member, nor to any other Undertaker for any merchandise or service rendered, unless first specifically authorized in writing by the Duncan Funeral Home."

Honorable William E. Gladden

CONTRACT No. 1515

AMOUNT \$ 400.00

DUNCAN FUNERAL
HOMES

Pre-Arranged Funeral
Contract with

Firman Goforth

Summersville, Missouri

Failure to notify Duncan
Funeral Home immediately in
event of death voids this
contract

Make payments by mail or
at our office in Mountain
View, Missouri

WE HAVE NO
COLLECTORS

The letter of Joe R. Duncan, dated May 19, 1961 directed to
Mr. Firman Goforth, reads as follows:

"Mr. Firman Goforth
Summersville
Missouri

Dear Firman:

Our pre-arranged funeral contract states that when you take
our policy, you will pay so much a quarter until the sum is
fully paid. Another thing that our policy has that cannot
be written in, because of the Missouri Statutes, is should
death occur, the contract is fully paid and you will never
pay another penny on the person that has passed away.

Another Funeral Home that has a policy similar to ours has
spread the rumor that should one of our members pass away,
the remaining members of the family will have to finish out
the unpaid balance. If anyone would only stop to think,
they would know this is not true. All thats necessary is

There is no need of anyone
being in doubt as to the High
Quality Funeral Merchandise
that is furnished, same is on
display at Duncan Funeral Homes,
at all times for inspection.
The public is cordially invited.

Do not permit anyone to get
you to drop this Contract, the
only interest he has in you or
your family is the amount of
collection fee, or commission
which he will make if he can
induce you to drop your Funeral
Contract and take one in his
Company.

Honorable William E. Gladden

to ask some of those that have had deaths while a policy holder with us. Just ask the Lindsey, Brawley, Honeycutt, or Counts families. They will be glad to tell you how much they received after only one quarterly payment being made.

We have been Funeral Directors in this area for 53 years. You know we could not have stayed in business for that long a period without being honest and fair in all our dealings.

With kindest personal regards, I remain

Most sincerely,

s/ Joe R. Duncan

Joe R. Duncan."

Missouri statutes do not define the word "insurance". In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S. W. 1084, 257 Mo. 529, L. o. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

The insurance character of burial associations is attested by the following language found in Section 376.020, RSMo 1959 of Missouri's regular life insurance law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri; all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each members, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such

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association, shall not be construed to be a life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

Of particular interest in connection with the contract here being considered we submit the following text from Couch on Insurance 2d, Sec. 1:63:

"A contract of industrial or burial insurance must be distinguished from a contract with an undertaker for the advance purchase, whether or not on an installment plan, of funeral services to be rendered the purchaser upon his death. Thus, a contract to furnish funeral services and burial clothing will not be held to constitute life insurance from the fact alone that the performance of the contract is contingent upon the death of the insured, in the absence of evidence to show that the amount payable by the purchaser is less than the value of the funeral or merchandise contracted for, or that there is any element of risk involved on the part of either the purchaser or the seller, at least where the contract does not purport upon its face to be one of life insurance. Except as such a contract may be specifically declared life insurance by statute, the issuance by the proprietor of a funeral home of contracts which, by their terms, entitle the holders and their families or dependents to complete funeral services at cost plus 10 per cent, but contain no provision for periodical assessments or dues or for the forfeiture of payments, is merely a contract for the sale of goods and services rather than a contract of insurance and is therefore not subject to a statute regulating the business of insurance."
(Underscoring supplied.)

The underscored language in the preceding quotation from Couch on Insurance 2d, Sec. 1:63, reflects a rule by which Contract No. 1515, here being considered, will be judged.

Summarizing the essential provisions of Contract No. 1515, dated May 9, 1961, we find that the maximum value of funeral

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benefits contracted to be furnished Firman Goforth by Duncan Funeral Homes is \$400.00. Furnishing of the benefits is contingent upon the death of Firman Goforth. Payment of the \$400.00 is promised in quarterly installments of \$9.00 each. Failure to make one or more quarterly installment payments is treated in the following language in the contract:

"Should the undersigned fail to make quarterly payments as set out above, on the date specified, said agreement shall not become null and void by reason thereof and the undersigned shall be entitled to paid up funeral benefits in a sum equal to the full amount of all payments which have been paid, in merchandise only, through the Duncan Funeral Home."

Under the provision of the contract just quoted above, failure to make all installment payments under the contract merely limits the benefits to a receipt of merchandise only, in an amount equal in value to the payments made. This will result in the contracting party getting in merchandise only that which he has paid for.

Under the third paragraph of Contract No. 1515, complete funeral services are to be rendered only in the event the entire amount of \$400.00 has been paid. This provision also guards against giving to the contracting party funeral services at a stated price of \$400.00 for any amount less than \$400.00. One additional provision found on the face of Contract No. 1515 discloses an absence of a risk element in the contract by providing as follows:

"All of the benefits and provisions of this agreement may inure to any member of the immediate family of the undersigned should such contingency arise, upon payment of the unpaid amount due under the contract."
(Underscoring supplied.)

Again, in the provision just quoted from Contract No. 1515, we find that Duncan Funeral Home is not promising to render services or merchandise for less than the full \$400.00 contract price even though someone other than the original contracting party is assuming the payments required by the contract.

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In the case of Knight v. Finnegan (D.C. Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Under the contract being construed, Contract No. 1515, the contract holder, as well as those members of his immediate family who would choose to have such benefits inure to them, must meet the full contract price of \$400.00 before Duncan Funeral Homes is obligated to render full services under the contract. No "risk" whatever is being insured by Duncan Funeral Homes if it requires the contract holder, or others who would stand in his position, to comply with the patent provisions of the contract. The funeral home is only contracting to furnish services or merchandise in an amount equal to that which the contract holder is required to pay in money.

We now consider the letter of Duncan Funeral Homes, dated May 19, 1961, addressed to the contract holder of Contract No. 1515, quoted in the forepart of this opinion. The first paragraph of such letter provides as follows:

"Our pre-arranged funeral contract states that when you take our policy, you will pay so much a quarter until the sum is fully paid. Another thing that our policy has that cannot be written in, because of the Missouri Statutes, is should death occur, the contract is fully paid and you will never pay another penny on the person that has passed away."

As we view the letter of Duncan Funeral Homes, dated May 19, 1961, and particularly the first paragraph thereof, above quoted, in the light of its relationship to Contract No. 1515, it constitutes an overt act on the part of Duncan Funeral Homes placing a "risk" element into Contract No. 1515 which will cause such contract to be carried out as an insurance contract. By agreeing with the contract holder to furnish services in the event of death of the contract holder without requiring full payment of the contract price of \$400.00 stated in Contract No. 1515, Duncan Funeral Homes is assuming an insurable "risk" and promising to

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pay, in services or merchandise of agreed money value, that which may or may not bear any true relationship to the installment payments made on the contract at the time of death of the contract holder.

The request for this opinion discloses that each contract form corresponding to Contract No. 1515 is accompanied by a letter corresponding to the letter of May 19, 1961, addressed to Firman Goforth. In view of such fact, contract No. 1515 and the letter of May 19, 1961 addressed to the contract holder by Duncan Funeral Homes evidence the true agreement between the contracting parties, and together constitute the contract.

In State v. Griffin, Mo. App., 246 S. W. 2d 396, 1.c. 398, we find the following principle of contract law stated:

"It is a well recognized rule of law that a contract need not be in a single document but may be made up of several separate instruments or documents."

CONCLUSION

It is the opinion of this office that Contract No. 1515 negotiated by Duncan Funeral Homes is not on its face an insurance policy, but the letter of May 19, 1961, directed by Duncan Funeral Homes in relation to Contract No. 1515, causes the contract to be one of insurance within the meaning of Section 375.310, RSMo. 1959, and offering of the same to the public without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons and corporations so offering such contracts to be subject to the penalties prescribed by Sections 375.300 and 375.310, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

Thomas F. Eagleton
Attorney General

COUNTY TREASURERS: County treasurer must pay or protest
COUNTY COURTS: warrant drawn on fund properly budgeted
COUNTY BUDGET: even though anticipated revenues as
WARRANTS: budgeted may exceed revenues actually
collected.

July 25, 1961



Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

We are in receipt of your letter requesting an opinion of this office, which letter reads as follows:

"Atchison County is in the financial condition where during the current year the amount of protested warrants may exceed taxes payable during the year. Because of this condition the county treasurer has asked me to request your opinion on the following question:

What is the financial limit of the County Treasurer on protested warrants in a Third Class County with county organization in Class No. 3 Special Road and Bridge Fund?

"That is, may he accept protested warrants beyond the anticipated revenue for the current year?"

It appears from information subsequently supplied by you and by the Treasurer of Atchison County that you have reference to a situation in which expenditures budgeted by the county court on the basis of anticipated revenue for the year in the Special Road and Bridge Fund may exceed revenues actually paid into that fund and that you wish to know whether the Treasurer may continue to protest warrants drawn on that fund.

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The County Budget law, as applicable to third class counties, Sections 50.670 thru 50.750, RSMo 1959, requires the county court to prepare an annual budget in which anticipated revenues are estimated in accordance with a statutory formula and balanced against proposed expenditures classified according to a prescribed priority. Section 50.740(3) provides a sanction for violation of the Budget law, as follows:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

The county treasurer acts in a ministerial capacity in paying warrants drawn by order of the county court and normally has no choice but to pay such warrants or to protest warrants drawn on a fund in which there is not sufficient money for payment. In fact, a misdemeanor penalty is imposed by Section 54.140, RSMo 1959, for his failure or refusal to do so. In *Jackson County v. Payman*, 44 SW2d 849, the Supreme Court said, 1.c. 857:

"Much is also said as to the heavy penalties imposed on county treasurers as ministerial officers in refusing to pay county warrants regularly issued by the county and presented for payment. It is true that such ministerial officers are not and should not be required to investigate and determine for himself the legality or validity of such warrants, and should ordinarily pay same without question. * * *"

However, in view of the liability prescribed by Section 50.740(3), supra, it is apparent that county officers participating in the issuance or payment of a warrant must inquire into the validity of a warrant to the extent of ascertaining that its issuance does not violate the County Budget law. In *State ex rel. Ginger v. Palmer*, 198 SW2d 10, a county clerk

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was held liable on his bond under this section for issuing warrants drawn on order of the county court on the Special Road and Bridge Fund where the county court had not included the anticipated revenues and proposed expenditures for the fund in the budget.

The question of warrants issued within the budgetary limitation on anticipated revenue where such revenue was not actually collected was considered by the Supreme Court in State ex rel. Clark County v. Hackmann, 218 SW 318. The Court said, 1.c. 320:

"II. In the very lucid brief of the Attorney General for respondent it is said:

'The only manner by which an indebtedness in excess of the income and revenue for any year may be lawfully created is with the assent of two-thirds of the qualified voters voting at an election held for that purpose, as provided by section 12 of article 10 of the Constitution.'

"[1] This is a true statement of the situation, if you read into it what this court has repeatedly said, as we have outlined in the previous paragraph. That is to say an indebtedness contracted in excess of the anticipated revenue is invalid, but an indebtedness contracted within the anticipated year's revenue is valid, although all of the anticipated revenue may not be collected. It is the revenue which is provided for and should come into the county treasury, during the year, that fixes the status (as to validity or invalidity) of the indebtedness contracted during the year, rather than the revenue actually collected and paid out on warrants. We should probably use the term 'income and revenue' as distinguished counsel have used, because the receipts of a county may come from several different sources.

"So, too, when this court has said (and rightfully so) that the purpose of sections 11 and 12 of article 10 of the Constitution was to place the business of the counties upon a cash basis, we did not mean that debts contracted within the anticipated revenues of the year were invalid, because the collected revenues were insufficient to meet all of such debts. Nor did we mean by such expression that warrants issued for such debts were invalid, because all of them could not be paid out of the revenue actually collected. Nor did we mean that each debt should be met with cash, but we did mean that during the fiscal year the cash would be available to meet the debt if the anticipated revenue was collected and rightfully disbursed. In other words, we have dealt with the matter upon the basis of a year's business, and the term 'cash basis' has been used in the sense that the anticipated revenues of the year should at least equal the contracted debts of the year. Such has been our construction of the constitutional system, and as suggested by counsel for respondent, and if the county desired to contract debts in excess of the year's revenue, resort would have to be made to the people for their consent to the creation of such debt."

It should be noted also that the preparation of the budget and the estimate of anticipated revenue is the exclusive responsibility of the county court. Nowhere in the Budget law is it provided that an estimate of anticipated revenues shall be made by the county treasurer or that he shall look behind a budget prepared in accordance with the statutory formula. The anticipated revenue of the county for the current year is the amount which the county court has estimated to be such in the annual budget and it is this amount that marks the limit of county spending for that year.

CONCLUSION

In view of the foregoing, it is the opinion of this office that a county treasurer must perform his ministerial duty in

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paying or protesting warrants, as the case may be, so long as said warrants are for expenditures contemplated by the county budget and within the estimate of anticipated revenue contained in that budget. The fact that there is a possibility that the total revenue collected may not come up to the revenue anticipated by the county court does not alter the treasurer's duty, absent any showing of fraud in the preparation of the budget.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

ROAD DISTRICTS:
CONSERVATION COMMISSION:
DISSOLUTION OF ROAD DISTRICTS:
CREATION OF ROAD DISTRICTS:

Land owned by the State Conservation Commission does not count in the total acreage of an area for the purposes of determining whether landowners petitioning for the creation or dissolution of a special road district own at least 50% of the acreage as required by law.

July 21, 1961



Honorable Morran D. Harris
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Mr. Harris:

This is in reply to your opinion request of May 26, 1961, wherein you state:

"Petition has been filed with the County Court of St. Clair County asking for the dissolution of Taber Township Special Road District, under the provisions of Section 233.295 RSMo. 1959, and the County Court has set the matter down for hearing for June 7, 1961. There are about 2500 acres in this special road district, of which some 1000 acres are owned by the Conservation Commission of the State of Missouri. The parties who have signed the petition for dissolution own slightly less than one-half of the total acreage in the district, but they own more than one-half of the acreage exclusive of the acreage owned by the Conservation Commission.

"The County Court has asked me to request your opinion on two questions: 1. Does the acreage owned by the Conservation Commission, or any other Government Agency, count in the total acreage in the district for the purpose of determining whether or not those parties petitioning for dissolution own at least 50 per cent of the acreage as required by law? and: 2. If it does count in the total, may the

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Conservation Commission or any other Government Agency owning land therein, sign the petition for dissolution or the remonstrance?

"We would appreciate your opinion by June 7 if possible. If not, I will ask the Court to take the matter under advisement at the time of the hearing until we get the opinion."

Section 233.295, RSMo 1959, states as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of sections 233.170 to 233.315 shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced to disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

Pursuant to said sections, in order for the county court to create a road district, it must rule on a petition signed by the owners of a majority of the acres of land within the proposed district to be organized.

We are directly confronted with the question, "Is land owned by the State Conservation Commission and situated within a special road district formed under the provisions of Sections 233.170 to 233.315, RSMo 1959, subject to taxation or special assessment?"

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Section 41, Article IV, Constitution of Missouri, 1945, provides: "The commission may acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for its purposes, and shall exercise the right of eminent domain as provided by law for the highway commission."

Thus, pursuant to this section of the Constitution, the Conservation Commission may acquire property, and hold same in its governmental capacity.

Section 6, Article X, Constitution of Missouri, 1945, specifically exempts from taxation all property, real and personal, of the State of Missouri, and further provides that all laws exempting from taxation property other than the property enumerated in said Article X shall be void. Said section states:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

In addition thereto, Section 137.100, RSMo 1959, provides:

"The following subjects are exempt from taxation for state, county or local purposes:

"(1) Lands and other property belonging to this state;"

In *Normandy Consolidated School District v. Wellston Sewer District*, 77 S. W. 2d 477, 1.c.478, the St. Louis Court of Appeals stated:

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"But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property shall be subject to the assessment."

A review of Sections 233.170 to 233.315, RSMo 1959, as well as other sections of the Missouri Statutes, discloses no statutory authority for the levying of special assessments against state property situated within a special road district created pursuant to Sections 233.170 to 233.315, RSMo 1959.

Based upon the foregoing, it may be stated that land owned by the State Conservation Commission and situated within a special road district is not subject to taxes or special assessments.

To include the land owned by the Conservation Commission in the total acreage of an area for the purpose of determining whether landowners in the area petitioning either for establishment or dissolution of a road district comprise a majority of the acreage owners within the district would create an inequitable and intolerable situation. For, in a situation, such as presented in this case, wherein the special road district consists of a total of 2500 acres of which some 1000 acres are owned by the Conservation Commission, it might well be near to impossible to dissolve as well as create such a special road district without the consent and cooperation of the Conservation Commission. In situations where over half of the land acreage in an area is owned by the Conservation Commission, it would be possible for the Commission to completely defeat any attempt to create a road district in said area, notwithstanding the wishes of all of the other landowners to the contrary in said area.

Thus you would have a situation whereby those landowners

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subject to taxation would have a privilege estopped by landowners not subject to taxation.

On the other hand, it would be possible, in the event the Commission owned over 50% of the land acreage in an area, to have a road district created by a petition signed by a duly authorized representative of the Commission alone. The creation of such a road district might well be contrary to the wishes of the other landowners in the created district. If the Commission purchased over half of the total acreage in an established road district, it could prevent dissolution by refusing to sign a petition for dissolution in the event the other landowners wished to do so.

Thus you would have a state agency not subject to property tax controlling the disposition of the property tax of landowners subject to tax, without an opportunity for these taxable landowners to determine the disposition of their property taxes.

In addition to the foregoing, Section 653 of 59 C.J., page 1103, states the following rule of statutory construction:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, as included by necessary implication. . . ."

Since Sections 233.170 to 233.315 disclose no language either directly or by implication referring to real property owned by the state or its agencies, the rule quoted above applies.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the land owned by the State Conservation Commission does not count in the total acreage of an area for the purposes of determining whether landowners petitioning for the creation or dissolution of a special road district own a majority of the acreage as

Honorable Morran D. Harris

required by law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

PUBLIC RECORDS:
MICRO-FILMING:
ORIGINALS DESTROYED
BY SECRETARY OF STATE:
WHEN:

Sections 109.120 and 109.130, RSMo 1959 authorize Secretary of State to micro-film permanent records of articles of incorporation with amendments, of "inactive" domestic and foreign corporations and fictitious names records five or more years old, and deem reproductions originals. Reproductions to be placed in conveniently accessible files for preservation and examination. He may certify facts to governor and if governor orders destruction of records from which reproductions made, secretary of state may destroy same.

April 21, 1961



Mr. Warren E. Hearnes
Secretary of State
State Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnes:

This office is in receipt of your request for a legal opinion, which reads in part as follows:

"1. May the Secretary of State pursuant to Sections 28.100, 109.120, 109.130, 109.140 or other statutory provisions, micro-film the corporate records of the corporations referred to in Exhibits "A" and "B" and the Fictitious Name registrations referred to in Exhibit "C", preserve such micro-filming as original records, and there after destroy the original records.

"2. Assuming such records may be destroyed, what procedure shall be followed.

"3. In the case of foreign corporations, Exhibit "B", will it be necessary to micro-film and preserve the Articles of Incorporation and amendments thereto in view of the fact that such original records are on file in the various states, and that only certifications of such records from these various states are on file with the Secretary of State of Missouri."

The opinion request refers to attached Exhibits "A", "B" and "C", the contents of which will be referred to herein.

Exhibit "A", refers to domestic business corporation

Mr. Warren E. Hearnese

records legally required to be kept by the secretary of state. From said Exhibit, it appears that more than 100,000 corporations have been organized in Missouri since 1849. 30,000 of these are presently in good standing, while 70,000 have for different reasons, lost their corporate identity, and it is with the records of these "inactive" corporations the present inquiry has been asked.

Exhibit "B", refers to corporations organized and existing under the laws of other states, seeking to do business in Missouri, and the records of such corporations are required to be kept by the secretary of state of Missouri. It appears that from 1898, approximately 15,000 foreign corporations have qualified to do business in this state. Of the original number 5,000 are presently in good standing, and 10,000 have lost their authority to do business in the state, and it is with the records of such "inactive" corporations the present inquiry has been asked.

Exhibit "C", refers to records on "fictitious names", registrations, required by the applicable statutes to be kept by the secretary of state. Since the first filing in 1919, nearly 52,000 fictitious names registrations have been effected.

The statutes fail to regulate the amendment, withdrawal or renewal of the filings, and it cannot be ascertained how many of the total number of registrations are "currently accurate", and those on "inoperative business". The secretary of state proposes to micro-film all fictitious names registrations records on file in his office five years or more and to destroy the original records thereafter.

Section 351.060, RSMo 1959, requires the articles of incorporation of domestic business corporations to be signed, sworn and acknowledged by all incorporators and to be delivered in duplicate to the secretary of state of every such corporation granted authority to do business. The secretary of state shall retain one copy of the articles of incorporation and all amendments thereto, as a permanent record in his office.

Before attempting to do business in Missouri, foreign corporations must procure a certificate from the secretary of state, authorizing them to do so, in accordance with the provisions of Sections 351.570 to 351.610, RSMo 1959, accompanying the application containing certain information, set out in

Mr. Warren E. Hearnese

Section 351.580. Section 351.585, RSMo 1959, requires properly authenticated duplicate copies of the articles of incorporation, with all amendments, to be filed with the secretary of state, one of which duplicate copies, he shall retain in his office as a permanent record.

Section 417.200 to 417.230, RSMo 1959, requires persons operating a business under a fictitious name, or under any name other than the true names of such persons, within five days after engaging in such business to register the fictitious name with the secretary of state, together with a verified statement of the information required by Section 417.210.

Sections 28.100, 109.120, 109.130 and 109.140, RSMo 1959, have been referred to in the opinion request, and each section will be quoted herein.

Section 28.100, reads as follows:

"During each biennial session of the general assembly, the secretary of state may, in the presence of a joint committee of the house of representatives and senate, destroy, by burning or by any other method satisfactory to said joint committee, such records, financial statements and such public documents which may be on file in the office of the secretary of state or his predecessor as custodian of such records and documents for a period of five years or longer and which are determined to be obsolete or of no further public use or value, except such records and documents as may at the time be the subject of litigation or dispute. Said joint committee shall consist of four members of the house of representatives, to be appointed by the speaker of the house of representatives, and two members of the senate, to be appointed by the president pro tem of the senate."

From said section it appears that during each biennial session of the general assembly, in the presence of a joint committee of the house of representatives and senate, the secretary of state may destroy by burning, or by any other method satisfactory to the committee, such records, financial statements and public documents on file in the secretary of state's office for a period of five years or longer, determined to be of no further public use or value, except those records

Mr. Warren E. Hearnnes

and documents which may at the time be the subject of litigation or dispute.

The section is not clear as to whether the committee or the secretary of state shall make the determination as to what records shall be destroyed, nor is there any indication in the section whether such determination shall be made prior to or at the committee meeting.

While said section clearly indicates obsolete records kept five or more years, no longer of any public use or value may be destroyed, no reference is made in this or any other section for reproducing such records prior to their destruction, possibly for the reason the lawmakers may have thought it unnecessary to provide any statutory provisions authorizing the reproduction of records no longer of any public use or value.

The following statements are found in Exhibits "A", "B" and "C", respectively:

"Information from these records is periodically requested thus preventing the destruction of all records of such corporations."

"The need for periodic information from these records prevents the complete destruction of such records without making some suitable records to be used instead."

"All of these files are used as in the case of inactive corporations, to obtain information periodically requested by the public."

From these statements it is apparent the "inactive" corporation records and fictitious names records five or more years old are not obsolete public records, of no further use or value, within the meaning of Section 28.100 supra, consequently, said section is inapplicable to the records referred to in the opinion request and exhibits.

Section 109.120, RSMo 1959, reads as follows:

"The head of any business, industry, profession, occupation or calling, or the head of any state, county or municipal department, commission, bureau or board may cause any or all records kept by such official, department, commission, bureau, board or business to be photographed,

Mr. Warren E. Hearnes

microphotographed, photostated or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce such records on such film or material shall be such as to accurately reproduce and perpetuate the original records in all details."

Section 109.130, RSMo 1959, reads as follows:

"Such photostatic copy, photograph, microphotograph or photographic film of the original records shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies. A facsimile, exemplification or certified copy thereof, shall, for all purposes recited in sections 109.120 to 109.140, be deemed to be a transcript, exemplification or certified copy of the original."

Section 109.120 supra, authorizes the reproduction of "any or all records kept," by certain persons, including the head of any state, county or municipal department, commission, board or bureau, or official by any of the methods herein named, i.e., "to be photographed, microphotographed, photostated or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce such records on such film or material shall be such as to accurately reproduce and perpetuate the original records in all details."

It is obvious the secretary of state is the head of a state governmental department, or a state official within the meaning of the terms of Section 109.120 supra, and he is authorized by the section to reproduce the domestic and foreign corporation records and fictitious names records referred to in the opinion request, by any of the methods of reproduction named. Micro-filming has not been specifically named, and unless it is included within the meaning of those methods which have been named, such records cannot be micro-filmed. To determine this point, we call attention to the following definition of the word "micro-film" as given by Webster's New Collegiate Dictionary.

"A film of small size: specif., a strip of film of standard motion-picture film size or smaller, used for keeping a photographic record of printed matter, manuscripts, etc., in a small space * * * To photograph on micro-film."

Mr. Warren E. Hearnnes

Assuming the micro-film referred to in the opinion request is of durable material and the process is sufficient to accurately reproduce and perpetuate the records in all details, as required by the statute, and also bearing in mind the above quoted definition of the word "micro-film", it is believed the reproduction of original records by said process is authorized by Section 109.120 supra.

Therefore, in view of the foregoing, and in answer to the first part of the first inquiry, it is our thought that Sections 109.120, and 109.130 supra, authorize the secretary of state to micro-film the "inactive" domestic and foreign corporation records, and fictitious names registration records five or more years old, and to preserve the reproductions as original records in his office.

The latter part of the first inquiry, as to whether or not the records from which the micro-films will have been made, may be destroyed, remains to be discussed. The authority conferred on the secretary of state by this section does not in and of itself confer power on him to destroy records after they have been micro-filmed.

Section 109.140, RSMo 1959, provides when records from which reproductions have been made may be stored, disposed of, or destroyed and reads as follows:

"Whenever such photostatic copies, photographs, microphotographs or reproductions on films shall be placed in conveniently accessible files and provisions made for preserving, examining and using same, the said head of a state department, commission, bureau or board, county office or department, city office or department may certify those facts to the governor, or to the county court or to the mayor of a municipality, respectively, according to their status as subdivisions of government, who shall have the power to authorize the disposal, archival storage or destruction of the records or papers from which such photographic copies were made."

After the micro-filming of the "inactive" domestic and foreign corporation records, and the fictitious names registration records on file in his office for five or more years has been accomplished by the secretary of state, he shall place the reproductions in conveniently accessible files, making satisfactory provisions for the examination and use of the reproductions, in accordance with the provisions of

Mr. Warren E. Hearn

above quoted section. Thereafter, the secretary of state may certify these facts to the governor of Missouri, who is empowered to authorize the disposal, archival storage or destruction of the records from which micro-films were made. In the event the governor orders such records destroyed, the secretary of state may then proceed to destroy them.

It is believed that the answer to the second inquiry has been given in the preceeding paragraph answering the latter part of the first inquiry.

The micro-filming of the records of "inactive" domestic and foreign corporations, and the preservation of the reproductions as original records was considered fully in our discussion of the first inquiry. Since there is no difference in the method of reproduction and preservation of domestic and foreign corporation records by micro-filming, in view of the foregoing, and in answer to the third inquiry, it is our thought that it will be necessary to micro-film and preserve the reproductions of the articles of incorporation and all amendments of foreign corporations, regardless of the fact such original corporate records are on file in the various states where such corporations were organized, and only certified copies of such records are on file in the office of the secretary of state.

CONCLUSION

Therefore, it is the opinion of this office the secretary of state of Missouri, is authorized, under provisions of Sections 109.120 and 109.130, RSMo 1959, to micro-film permanent records in his office, of articles of incorporation, with amendments thereto, of all "inactive" domestic and foreign business corporations, and also permanent records of fictitious names registrations, five years or more old, and to deem the reproductions thereof as original records.

It is further the opinion of this office said micro-filmed reproductions shall be placed in conveniently accessible files, with adequate provisions made for their preservation and examination, in accordance with the provisions of Section 109.140, RSMo 1959, which facts, the secretary of state may certify to the governor of Missouri. If the governor shall order the records from which the reproductions were made, destroyed, as authorized by the section, the secretary of

Mr. Warren E. Hearnese

state may then destroy such records.

The foregoing opinion, which I hereby approve, was prepared by my assistant Paul N. Chitwood.

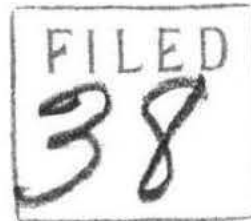
Very truly yours,

THOMAS F. EAGLETON
Attorney General

PNC:vm

CONSTITUTIONAL AMENDMENT: Ballot title for ~~House Committee~~
~~Subcommittee~~ House Joint
Resolution No. 2.

June 28, 1961



Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Joint Resolution No. 2

Dear Mr. Hearnes:

Pursuant to your request of June 23, 1961,
and pursuant to the directive found in Section
125.030, RSMo 1959, I submit the following bal-
lot title in relation to the above subject:

To increase maximum tax rates for
City of St. Louis school district
and certain charter counties and
permit county school tax in cer-
tain charter counties.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CONSTITUTIONAL AMENDMENT: Ballot title for House Committee
Substitute for House Joint
Resolution No. 24.

June 28, 1961



Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Committee Substitute
for House Joint Resolution
No. 24

Dear Mr. Hearnes:

Pursuant to your request of June 23, 1961, and
pursuant to the directive found in Section 125.030,
RSMo 1959, I submit the following ballot title in
relation to the above subject:

Allocates state motor fuel tax
to state, counties, cities, towns
and villages; prohibits levy of
such tax by city, town or village
without two-thirds vote.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CONSTITUTIONAL AMENDMENT: Ballot title for House Joint
Resolution No. 9.

July 5, 1961



Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Joint Resolution No. 9

Dear Mr. Hearnes:

Pursuant to your request of June 28, 1961,
and pursuant to the directive found in Section
125.030, RSMo 1959, I submit the following bal-
lot title in relation to the above subject:

Authorizes political subdivisions
when authorized by law, to levy
taxes exceeding constitutional
limit for airports; and third and
fourth class counties for univer-
sity extension division.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CONSTITUTIONAL AMENDMENT: Ballot title for House Joint
Resolution No. 16.



July 12, 1961

Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Joint Resolution No. 16

Dear Mr. Hearnes:

Pursuant to your request of July 7, 1961, and
pursuant to the directive found in Section 125.030,
RSMo 1959, I submit the following ballot title in
relation to the above subject:

Provides that executive department
regulations promulgated pursuant
to statute shall be reviewed by
legislative committee and may be
suspended by resolution of General
Assembly.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CONSTITUTIONAL AMENDMENT: Ballot title for House Joint
Resolution No. 27.

July 12, 1961



Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Joint Resolution No. 27

Dear Mr. Hearnes:

Pursuant to your request of July 7, 1961, and
pursuant to the directive found in Section 125.030,
RSMo 1959, I submit the following ballot title in
relation to the above subject:

Permits increase of City of St.
Louis school district tax rate
to three times constitutional
limit and for four years by four-
sevenths popular vote.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CONSTITUTIONAL AMENDMENT: Ballot title for House Joint
Resolution No. 30.

July 12, 1961



Honorable Warren E. Hearnese
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Joint Resolution No. 30

Dear Mr. Hearnese:

Pursuant to your request of July 7, 1961, and
pursuant to the directive found in Section 125.030,
RSMo 1959, I submit the following ballot title in
relation to the above subject:

Providing that prohibition against
legislature granting public money
to private persons shall not pro-
hibit general laws pensioning or
increasing pensions of retired pub-
lic school teachers.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CONSTITUTIONAL AMENDMENT: Ballot title for House Committee
Substitute for House Joint
Resolution No. 3.

July 13, 1961



Honorable Warren E. Hearnese
Secretary of State
Capitol Building
Jefferson City, Missouri

Re: House Committee Substitute for
House Joint Resolution No. 3

Dear Mr. Hearnese:

Pursuant to your request of July 7, 1961, and
pursuant to the directive found in Section 125.030,
RSMo 1959, I submit the following ballot title in
relation to the above subject:

Enlarges charter county powers
outside cities; enlarges such
powers within municipalities
and political subdivisions by
contract therewith and in entire
county by majority popular vote.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

CITIES, TOWNS AND VILLAGES: A newspaper in which a third class City's financial reports are published in accordance with Section 77.110 must meet the requirements set out in Section 493.050.

LEGAL PUBLICATIONS:

FINANCIAL STATEMENTS: A newspaper having two hundred subscribers would qualify, assuming that such newspaper contains news of general character and interest to the community, as a newspaper of "general circulation" within the purview of Section 493.050.

September 29, 1961



Honorable John F. Hayner
Representative
11th District Jackson County
Independence, Missouri

Dear Mr. Hayner:

This department is in receipt of your recent request for a legal opinion which, for the sake of brevity, may be summarized as follows:

- (1) Are the definitions in section 493.050 applicable to Section 77.110?
- (2) Does a newspaper having approximately two hundred subscribers qualify as a newspaper of "general circulation" within the meaning of Section 493.050?

Section 77.110, RSMo 1959, reads as follows:

"The council shall semiannually, in January and July of each year, publish a full and detailed statement of the receipts and expenditures and indebtedness of the city for the half year ending on December thirty-first and June thirtieth preceding the date of such report, which statement shall be published in some newspaper published in the city."

Section 493.050, RSMo 1959, reads as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published

Honorable John F. Hayner

in some daily, triweekly, semiweekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for subscription for a definite period of time; provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, triweekly, semiweekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section; provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section; provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the secretary of state of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period

Honorable John F. Hayner

of time. All laws or parts of laws in conflict with this section except sections 493.070 to 493.120, are hereby repealed. (R.S. 1939 §14968, A.L. 1943 p. 859)"

Inasmuch as Section 77.110 imposes upon the City Council of third class cities the duty to publish the cities' financial reports such reports would come within the language of Section 493.050 which lays down the publication requirements for "all public advertisements and orders of publication required by law to be made . . ." Thus a newspaper in which a third class city's financial reports are published in accordance with Section 77.110 must meet the requirements set out in Section 493.050.

You next inquire as to whether or not a newspaper having two hundred subscribers qualifies as a newspaper of "general circulation" within the meaning of Section 493.050. In *State v. Holman*, Mo. Sup., 275 S.W. 2d 280, 1.c. 282, the Court approved the following criteria for defining a newspaper of "general circulation":

"* * * First that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. Second, that, even though a newspaper is of particular interest to a particular class of persons, yet, if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of "general circulation"."

The court further held that a newspaper which had approximately fifty subscribers in a county was a newspaper of "general circulation" in that county. Under the holding of the *State v. Holman* case a newspaper having two hundred subscribers and which meets the other criteria set out in *State v. Holman*, would qualify assuming that it further meets the requirements set out by Section 493.050, as a newspaper of "general circulation" as required by Section 493.050.

CONCLUSION

It is therefore, the opinion of this office that:

(1) A newspaper in which a third class city's financial reports are published in accordance with Section 77.110 must meet the requirements set out in Section 493.050;

Honorable John F. Hayner

(2) A newspaper having two hundred subscribers would qualify, assuming that such newspaper contains news of general character and interest to the community, and assuming that it meets the requirements set out in Section 493.050, as a newspaper of "general circulation" and assuming other requirements of Section 493.050 are met.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gilbert D. Stephenson.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

GDS:aa

Opinion request No. 355 answered by this letter.

November 30, 1961



Mr. Edward E. Haynes
Personnel Officer
Department of Corrections
State Capitol, Room 115
Jefferson City, Missouri

Dear Mr. Haynes:

This is in reply to your letter of recent date in which you inquire about the procedure to be used in satisfying a certain judgment rendered in Cause No. 13946 in the Circuit Court of Cole County, Missouri, against the Department of Corrections.

Since receiving this request you have informed us further that your inquiry concerns only those employees that were parties plaintiff and recovered judgment in the above cause.

In House Bill No. 758, enacted by the 71st General Assembly, an appropriation was made for the payment of the judgment rendered in Cause No. 13946 of the Circuit Court of Cole County, Missouri, amounting to \$48,593.54. Of course, the money provided by this appropriation can be used only for the satisfaction of the judgment for which it was appropriated.

You want to know whether payment may be made to plaintiffs who were former employees and who have resigned or been dismissed from state service. It is our opinion that any person who recovered judgment in the above entitled cause is entitled to be paid from this appropriation without regard to whether he resigned or was dismissed from state service.

Mr. Edward E. Haynes

-2-

You also state that some twenty-six former employees who recovered judgment died before receiving payment. You inquire whether payment should be made to the heirs of the deceased and the method to be used in determining the proper heirs.

You have no authority to determine the heirs or who is entitled to receive payment of the judgment under such circumstances. Only the Probate Court has such authority.

Where the former employee has recovered judgment and died before the judgment was satisfied, payment of the judgment has to be made to the legal representative of his estate, who ordinarily would be an administrator or executor. If there is an administrator or executor of his estate, payment should be made to him. If there is no administrator or executor, then the Probate Court must determine who is entitled to collect the judgment. Payment should be made only to the person authorized to receive it under an order of a Probate Court, and a certified copy of such authority under the seal of the court should be presented, together with a receipt signed by the person receiving the money at the time payment is made.

If there is any question in your mind as to the validity of the papers presented or the authority of the person presenting it, please get in touch with us. If you have any other questions regarding this matter, we will be glad to answer them.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:bj

PUBLIC SCHOOL RETIREMENT
SYSTEM:
MISSOURI STATE EMPLOYEES'
RETIREMENT SYSTEM:
MEMBERS OF THE GENERAL
ASSEMBLY:
LEGISLATORS:

A member of the General Assembly who is covered by the retirement or benefit fund of the Public School Retirement Fund cannot also become a member of the Missouri State Employees' Retirement System.

May 15, 1961



Mr. W. R. Henry
Representative Camden County
State Capitol Building
Jefferson City, Missouri

Mr. Ealum Bruffett
Representative Ozark County
State Capitol Building
Jefferson City, Missouri

Mr. F. L. Brenton
Representative Crawford County
State Capitol Building
Jefferson City, Missouri

Gentlemen:

This is in reply to your opinion request of March 22, 1961, wherein you ask:

"Can a public school teacher who is a member of the Public School Retirement System of Missouri and who is likewise a member of the State Assembly participate in both the Public School Retirement System and in the retirement system, which has been established for State Legislators."

The only prohibition we can find against a person belonging to both the Public School Retirement System of Missouri created by Sections 169.010 to 169.130 RSMo 1959 and the Missouri State Employees' Retirement System as created by Sections 104.310 to 104.550 is contained in the definition of employee under the Missouri State Employees' Retirement System in subsection 15 of Section 104.310 RSMo 1959 and the applicable portion of said statute reads as follows:

Messrs. Henry, Bruffett, and Brenton

"'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor
* * *" (Emphasis supplied)

The answer to your question then lies in the question of whether or not the state is a contributor to the Public School Retirement System of Missouri, created by Section 169.010 to 169.130.

Section 169.110 RSMo 1959 reads in part as follows:

" * * * and provided further, that the state of Missouri shall contribute no funds directly or indirectly to finance the plan to pay retirement allowances by appropriation bills or otherwise, except for payments or contributions of persons employed by the state board of education as provided in subsection 6 of section 169.010, and except those funds which the district may receive from time to time under a law or laws providing for a general apportionment of school moneys throughout all the state."
(Emphasis supplied)

The Legislature has made two exceptions to the rule that the state of Missouri shall contribute no funds to the Public School Retirement System of Missouri, one being in the case of persons employed by the State Board of Education and the other being those funds which a district may receive under a general apportionment of school moneys. Since these two exceptions are made, it is clear that the state does contribute money to the Public School Retirement System of Missouri in the case of persons employed by the State Board of Education and by means of funds which the district may receive under a general apportionment of school moneys.

Messrs. Henry, Bruffett, and Brenton

A person who is covered by the "retirement or benefit fund" of the Public School Retirement System of Missouri created under Sections 169.010 to 169.130, RSMo 1959, either as a contributing member of the system or as a retired beneficiary of the fund, is excluded from the definition of "employee" contained in Subsection 15 of Section 104.310, RSMo 1959 of the Missouri State Employees' Retirement System, because the State is a contributor to the retirement or benefit fund of the Public School Retirement System of Missouri.

CONCLUSION

It is the opinion of this office that a member of the General Assembly who is covered by the retirement or benefit fund of the Public School Retirement System of Missouri created under Sections 169.010 to 169.130, RSMo 1959, either as a contributing member of the system or as a retired beneficiary of the fund, is excluded from the definition of employee in Subsection 15 of Section 104.310, RSMo 1959 under the Missouri State Employees' Retirement System and therefore cannot become a member of the Missouri State Employees' Retirement System.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WWW:aa

NATIONAL GUARD:
MISSOURI STATE EMPLOYEES'
RETIREMENT SYSTEM:

A civilian employee of the Missouri State National Guard is entitled to the full benefits under the Missouri State Employees' Retirement System (Sections 104.310 to 104.660, RSMo 1959), notwithstanding the failure of the Federal Government to match said employees' four per cent contribution.

August 24, 1961



Mr. W. A. Hemphill
Secretary, State Employees' Retirement System
State Capitol Building
Jefferson City, Missouri

Dear Mr. Hemphill:

This is in reply to your opinion request of August 2, 1961, wherein you state:

"At a meeting of the Board of Trustees, on July 26, 1961, the Secretary was requested to ask for an informal opinion, as to whether or not the Board of Trustees could reduce the benefits of National Guard Employees to 50%, since they are only contributing 4%, which is the employees' share and the System is receiving no matching funds from the employer, which is the Federal Government."

Although civilian employees of the Missouri National Guard receive their compensation from the Federal Government and not from any department of the State of Missouri, they are specifically included under the Missouri State Employees' Retirement System, pursuant to Section 104.310(15) RSMo 1959, which states, in part, as follows:

". . .As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to section 709 of title 32 of the United States Code and paid from federal appropriated funds;"

Thus, being an employee under the State Retirement Act, it is mandatory that said employees become and remain members of the

Mr. W. A. Hemphill

Retirement System during their tenure of employment pursuant to Section 104.330. As such, under Section 104.360, four per cent is deducted from their annual compensation up to \$7500.00. This being done, said employees have completely fulfilled their obligations under the contractual agreement. The fact that the Federal Government is unable or unwilling to match the employees' contribution of four per cent as required by Section 104.370(3) would not serve to either oust these employees from their membership under the Retirement System or prevent them from receiving the full benefits under said system. This is so because the language of the State Retirement Act is silent as to the effect upon the benefits of such employees in the event the Federal Government does not match the employees' contribution of the required four per cent.

CONCLUSION

It is, therefore, the conclusion of this office that a civilian employee of the Missouri State National Guard is entitled to the full benefits under the Missouri State Employees' Retirement System (Sections 104.310 to 104.600, RSMo 1959), notwithstanding the failure of the Federal Government to match said employees' four per cent contribution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD:lc:ms

STATE EMPLOYEES:
RETIREMENT:
STATE RETIREMENT SYSTEM:

Those members retired prior to the effective date of the amendment to Section 104.390, V.A.M.S. 1961, increasing the normal annuity of a member from 5/6ths of one per cent to one per cent are not entitled to said increase in benefits.

October 19, 1961



Mr. W. A. Hemphill
Secretary
Missouri State Employees' Retirement System
Jefferson City, Missouri

Dear Mr. Hemphill:

This is in answer to your request for an opinion dated August 2, 1961, and which reads as follows:

"On July 26, 1961, the Board of Trustees of the Missouri State Employees' Retirement System met in the Senate Lounge for their quarterly meeting and during the meeting an increase for previously retired members was brought before the Board of Trustees.

"During the discussion, it was pointed out that since there was no increase in contributions by members of the System, could there be a possibility, on these merits, that an increase in benefits could be granted, since the 71st General Assembly amended Section 104.390, granting an increase in benefits from 5/6 of 1% to 1%.

"We would like for you to give us a formal opinion as to whether or not the Board of Trustees could authorize an increase to retired members."

As amended by the 71st General Assembly, the pertinent part of Section 104.390, V.A.M.S. 1961, now states:

"The normal annuity of a member shall equal one percent of the average compensation of the member multiplied by

Mr. W. A. Hemphill

the number of years of creditable service of such member, - - - -."

(House Bills Nos. 131 & 410.)

Thus the only change by the legislature, in this respect, was to increase the normal annuity of a member from 5/6ths of one per cent to one per cent.

On May 12, 1961, this office rendered an official opinion to Mr. Robert R. Welborn, Chairman of the Missouri State Employees' Retirement System, which held:

"1. An amendment to the 'Missouri State Employees' Retirement System' (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment without said employees voluntarily contributing a reasonable sum to the fund therefor, would be in violation of Article III, Section 39(3) of the Missouri Constitution.

"2. An amendment to the 'Missouri State Employees' Retirement System' (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment on the condition that said retired employees voluntarily pay a reasonable sum certain into said retirement system as a condition precedent to receiving said increased benefits would be valid."

We continue to adhere to that view.

As a result of said opinion, the issue now presented is whether or not there exists a present consideration on the part of those retired employees on the effective date of the amendment (October 15, 1961) so as to entitle them to the increase from 5/6ths of one per cent to one per cent. For, in the absence of a consideration passing from the retired employees to the system, said retired employees are not entitled to the increase.

Mr. W. A. Hemphill

A review of Section 104.390, V.A.M.S. 1961, as amended by the 71st Legislature, discloses no language contained therein which requires any consideration from the retired employees in order for them to receive the increase from 5/6ths of one per cent to one per cent. In fact, the language used discloses no specific legislative intent to provide for an increase in the benefits payable to retired employees. If the language authorizing an increase in benefits could be construed to apply to retired members as well as to those presently employed, it would be invalid under the ruling in our former opinion for the reason it fails to require any consideration passing from said retired members.

CONCLUSION

Those members of the Missouri State Employees' Retirement System retired prior to the effective date of Section 104.390, House Bills 131 and 410, of the 71st General Assembly, increasing the normal annuity of a member from 5/6ths of one per cent to one per cent are not entitled to said increase in benefits.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

STATE RETIREMENT SYSTEM:
COMMON STOCK:
INVESTMENT FUNDS:
LIFE INSURANCE COMPANIES:
CASUALTY INSURANCE COMPANIES:

The Board of Trustees of the State Retirement System may invest the funds of the System in common stock of any corporation organized under the laws of the United States, or of any state, subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

November 28, 1961

Mr. W. A. Hemphill, Secretary
Missouri State Employees' Retirement System
State Capitol Building
Jefferson City, Missouri

FILED
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Dear Mr. Hemphill:

This is in reply to your opinion request wherein you state:

"During the Board Meeting a report was made by their financial advisor on investments, as to the relative merits of initiating a common stock purchase program at this time.

"Since their report seemed favorable on this subject and before taking any action on same, the Board would like to have an opinion as to its legality."

Section 104.440(3), RSMo 1959, provides that the Board of Trustees may invest the funds of the State Retirement System in the following manner:

". . . The board may invest the funds of the system as permitted by laws of Missouri relating to the investment of capital, reserve, and surplus funds of life insurance companies or casualty companies organized under the laws of Missouri."

Section 376.305, RSMo 1959, authorizes life insurance companies in Missouri to invest in common stocks in domestic corporations. Said pertinent language is as follows:

"1. In addition to the investments permitted by section 376.300, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized or doing business under sections 376.010 to 376.670, may be invested in the common stock of any solvent corporation, organized under the laws of the United States, any state, territory or possession of the United States, or the District of Columbia; . . . "

In addition, said section sets forth the qualifications necessary in order to qualify common stock for investment by life insurance companies.

Casualty insurance companies are defined by Section 379.010, RSMo 1959, and their authority to invest in common stocks of domestic corporations is granted by Section 379.080, RSMo 1959, which states, in part, as follows:

". . . and the remainder of the capital of said companies and their other assets may be invested either in the property or securities in this section above mentioned, . . . or in stocks, bonds or evidence of indebtedness issued by corporations, organized under the laws of this state, or of the United States, or of any other state . . . provided, that no such insurance company may buy stock in any company to an amount which will give the company so buying the virtual control of any other corporation, . . . and no such company shall invest more than thirty-five per cent of the surplus to policyholders of such acquiring company, or fifty per cent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any other such corporation."

Although, by statute, both life insurance and casualty insurance companies are authorized to invest in common stock

of domestic corporations, statutory restrictions qualifying said stock are to be found only in regard to life insurance companies.

However, since both life and casualty insurance companies are authorized to invest in common stock, the Board of Trustees of the State Retirement System may invest the funds of the System in common stocks of any corporation organized under the laws of the United States, or of any state.

We feel it appropriate at this time to call your attention to the case of *Rand et al. v. McKittrick*, 142 S.W. 2d 29, in which Judge Westhues referred to the Restatement of the Law, on Trusts, and then stated at page 31, as follows:

"As to the duty of a trustee in making investments, see sec.227, page 645 of the same book, where we find the rule as follows:

'In making investments of trust funds the trustee is under a duty to the beneficiary

'(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived'.

"This latter statement is the yardstick generally used by the courts of the union in determining the duties of a trustee. Courts following the New York rule, as well as those following the Massachusetts rule, are in perfect harmony on this question. It is also the rule in this state. See *Cornet v. Cornet*, 269 Mo. 298, 190 S. W. 333, loc.cit. 339(5).

"[1,2] An analysis of these cases will disclose that the courts of the land

have required trustees of trust funds to exercise a greater degree of care and caution when investing such funds than prudent men ordinarily exercise when investing their own funds. Investments which are speculative in nature have been universally tabooed, by the courts of the union, as proper investments for trust funds. Yet prudent men may and do invest in speculative enterprises. *Wild v. Brown*, 120 N.J.Eq. 31, 183 A. 899. Hence the rule is well stated, Restatement of the Law, on Trusts, supra, that trustees may 'make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived'. The part we have italicized is important. . . . An examination of the cases will demonstrate that trust funds, in those states where the courts, legislature, or the people by constitutional provision have prohibited the investment of trust funds in stocks, have fared no better than have the trust funds in the states following the Massachusetts rule. We think this demonstrates that the preservation of trust estates depends more upon the integrity, honesty and business acumen of the trustees than it does upon arbitrary legal classification of securities wherein trust funds may be invested. . . . "

The Court then quoted with approval from the case of *Walker v. Buhl*, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569, as follows:

"When such a fund passes into the hands of a trustee, it becomes impressed with a double duty: First, to so invest it that it can be turned over at the expiration of the trust period without loss; and, second, to secure an income therefrom. He must act honestly and faithfully, and

in what he believes to be the best interest of the cestui que trust. He must exercise a sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters employ in their own affairs when making a permanent investment, in which the primary object is the preservation of the fund and the secondary one that of obtaining an income therefrom. He must not permit himself to take the hazard of an investment with the hope of largely increasing the fund as he might, perhaps, do in the prudent management of his own estate. The entire element of speculation must be removed. He must at all times remember that he is handling a trust fund, the care of which has been intrusted to him in reliance on his integrity, fidelity and sound business judgment."

In the absence of specific statutory restrictions on this type of investment, the Board of Trustees of the State Retirement System of Missouri, in administering and investing the funds of the system, are bound by this general law respecting trusts and trustees.

It is to be noted that our opinion holds that the Board of Trustees of the State Retirement System may invest in common stock of only corporations organized under the laws of the United States, or of any state, notwithstanding Section 376.305(1), RSMo 1959, which allows life insurance companies to also invest in common stock of certain corporations organized under the laws of a territory or possession of the United States.

The reason for the limitation in this opinion is due to the complexities in the law regarding corporations organized under the laws of territories and possessions of the United States. In addition, we deem it a remote possibility that the Board of Trustees of the State Retirement

Mr. W. A. Hemphill

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ment System would purchase common stock of said corporations. However, if in the future, the Board of Trustees of the State Retirement System desires to purchase common stock in said corporations, then, and in that event, this office will gladly furnish any opinion thereon.

CONCLUSION

The Board of Trustees of the State Retirement System may invest the funds of the System in common stock of any corporation organized under the laws of the United States, or of any state, subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

REPRESENTATIVE REDISTRICTING:
CENSUS:
SECRETARY OF STATE:
CONSTITUTIONAL LAW:
COUNTY COURTS:
BOARD OF ELECTION COMMISSIONERS:
COUNTY COUNCIL OF ST. LOUIS COUNTY:

Process of effecting reapportionment of representatives must commence without delay upon the taking of the census. Secretary of state must make the necessary certification forthwith, and upon receipt of such certification, when redistricting is required, the county courts and board of election commissioners in the City of St. Louis must effect such

redistricting within 60 days if possible by acting with expedition and due diligence. Statutory requirement that redistricting be completed within 60 days is directory, and a redistricting thereafter completed would be valid. In St. Louis County, county council performs the function of a county court in redistricting the county.

April 5, 1961

Honorable Patrick J. Hickey
Capitol Building
Missouri House of Representatives
Jefferson City, Missouri



Dear Mr. Hickey:

We have your request for an opinion as follows:

"Whether, under Section 22.050 R.S.Mo. 1959, the county court or election commissioners shall have 60 days to reapportion the representative districts, from the date of 'being officially so informed by the Secretary of State;' or whether the reapportionment shall be made 60 days from the effective date of the decennial census, July 1, 1961, as per Section 1.100 R.S.Mo., 1959."

Section 2 of Article III, Constitution of Missouri 1945 provides for the apportionment of members of the house of representatives and the manner in which such apportionment shall be effected. Said section provides in part as follows (emphasis supplied):

"***On the taking of each decennial census of the United States, the Secretary of State shall forthwith certify to the county courts, and to the body authorized to establish election precincts in the City of St. Louis, the number of representatives to be elected in the respective counties."

Section 3 of Article III provides as follows (emphasis supplied):

Honorable Patrick J. Hickey

"Representative districts in larger counties.--
When any county is entitled to more than one
representative, the county court, and in the
City of St. Louis the body authorized to
establish election precincts, shall divide the
county into districts of contiguous territory
as compact and nearly equal in population as
may be, in each of which one representative
shall be elected."

In the City of St. Louis, the board of election commissioners
is the body authorized to establish election precincts. Section
118.150 RSMo 1959.

Section 10 of Article III provides as follows:

"Basis of apportionment---alteration of districts.
---The last decennial census of the United States
shall be used in apportioning representatives and
determining the population of senatorial and repre-
sentative districts. Such districts may be altered
from time to time as public convenience may require."

Together, the foregoing provisions of the constitution
clearly express the intent that when the decennial census of the
United States has been taken, the process of making the necessary
redistricting shall immediately commence. Section 2 states that
"on the taking of the decennial census" the Secretary of State
shall "forthwith" certify to the county courts and to the body
authorized to establish election precincts in the City of St.
Louis the number of representatives to be elected in the re-
spective counties. The word "forthwith" is not susceptible of
any precise definition. Webster's New International Dictionary
(2nd Ed.), defines the word as follows:

"Immediately; without delay; hence, within a
reasonable time; promptly and with reasonable
dispatch."

The rule frequently applied is stated in *In re Costello's Estate*,
92 S.W. 2d 723 1.c. 725: "Generally 'forthwith' means within a
reasonable time under the circumstances." In the context of the
cited constitutional provisions, "forthwith" undoubtedly means
there be no delay in proceeding as expeditiously as reasonably
possible after receipt of the necessary information.

That the census has been "taken" admits of no reasonable
doubt whatever. Section 141 (a) of Title 13 USCA provides that

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the Secretary of Commerce shall, in the year 1960 "take" a census of population as of the first day of April. Section 141 (b) provides that the tabulation of total population by states as required for the apportionment of Representatives in Congress shall be completed within eight months. Section 2 of Title II USCA requires the President to transmit to Congress within one week after the first day of the regular session a statement showing the number of persons in each state and the number of Representatives to which each state is entitled, and makes it the duty of the clerk of the House within 15 days after receipt of such statement, to send to the executive of each state a certification of the number of Representatives to which each state is entitled. We know that the President and the clerk of the House have performed such duties. Other provisions of Title 13 USCA provide for the publication and distribution of census information.

The transcript of the debates of the 1944 Constitutional Convention throws some light upon the meaning and intent of Section 2 Article III of the Constitution. At pages 4245-4246, Mr. Phillips of the City of St. Louis discussed the amendments to that section which as originally presented provided that the ratio of representation "shall be ascertained at each apportionment session of the General Assembly." He stated that the purpose of his amendment was to eliminate a defect of the 1875 Constitution by preventing the General Assembly from keeping the apportionment from being made. He pointed out that there was no need to require an act of the General Assembly, since the apportionment was a mere matter of computation. He then made the following statement (pages 4245-6):

"Now the Congress of the United States had the same question before it and up until 1929 Congress itself passed apportionment acts for the House of Representatives of the Congress. They found their error and in the Act of 1929 they made it a mere matter of mathematical computation. They set the rule as our constitution sets it. They provided that when the census was taken the President should certify the result of the census to the clerk of the House of Representatives and then the Clerk sat down and figured out how many representatives in each Congress each state was entitled to and notified the Governor of each state. I intend to follow this amendment with a similar provision putting that duty on the Secretary of State, but this is the first step in that process. If we take these words out of

the Constitution we leave it open for the apportionment to be automatic without an act of the General Assembly. Now, that can be done in two ways, you can either let the election commissioners or the county clerk decide how many representatives the county is entitled to, or you can let the Secretary of State do it, but the amendment is the first step in a process of that kind."

After the amendment was adopted, Mr. Phillips then presented the further amendment which added the last sentence of the present Section 2. On page 4246 of the transcript of the debates the following appears:

"Mr. McReynolds: I notice you use the word 'taking' instead of the word 'completion'. I don't want to quibble about words, but I am wondering.

"Mr. Phillips: (Of St. Louis City) (Interrupting): Well, the reason for that Senator, is this; that under the census law the census of the United States is not completed for a period of three years but they ascertain the result in various states for the purpose of determining representation in Congress, and they do that within the first eight months, I think, and that is the reason I said 'taking' instead of 'completion'.

"Mr. McReynolds: You feel that word -----"

"Mr. Phillips (Of St. Louis City) (Interrupting) I think that covers it, yes sir.

"Mr. McReynolds: Will protect the situation?

"Mr. Phillips: (Of St. Louis City) Yes sir."

The foregoing discussion from the proceedings of the Constitutional Convention would strengthen the conclusion that the certification was a mere matter of arithmetic to be made as soon as the census has been taken even though not technically completed. The duty of making the computation was placed on one individual rather than leaving it to each individual County Court to do so.

Section 7 of Article III of the constitution provides with respect to senatorial apportionment that within sixty days after the population of this state is reported to the President for the decennial census of the United States, machinery shall be

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set up for the purpose of reapportionment of the 34 senators. It is a matter of public knowledge that such machinery has in fact been set up and that the commission for such purpose has been appointed and has commenced its work. We do not believe that the census could be deemed "taken" for purpose of senatorial apportionment, and not for the purpose of apportioning representatives.

Hence, on the basis of the above cited provisions of the constitution alone it would appear clear that it is the duty of the Secretary of State to certify to the proper official bodies the number of representatives to be elected in the respective counties within a reasonable time after he has notice of the population figures contained in such census.

Section 22.050 RSMo 1959, provides that the Secretary of State shall "forthwith" make the certification to the necessary official bodies "after each decennial census of the United States becomes effective under Section 1.100, RSMo." In effect, what this section provides is that after the decennial census has been "taken", but not until such census becomes "effective" under the provisions of the statute referred to (Section 1.100), the Secretary of State shall make the certification "forthwith". Thus, Section 22.050 would appear to modify the constitutional requirement of Section 2, Article III that the Secretary of State shall make the certification "forthwith" on the "taking" of the census. There is no language in the constitution which can reasonably be held to grant to the legislature the power to postpone the effective date of the decennial census, insofar as such census affects the duties of the Secretary of State and the county courts or board of election commissioners.

Section 3 of Article III provides that when a county is entitled to more than one representative, the county court and in the City of St. Louis the Board of Election Commissioners shall divide the county into districts. On the basis of the facts submitted to us, it appears that the county courts and board of election commissioners received the necessary official information on or about March 1, 1961. There is no provision in Section 3 which would justify a delay in commencing the necessary redistricting until some time after July 1, 1961. It is to be noted that when Section 22.050 was enacted the effective date of the census under Section 1.100 for all purposes was January 1. However, in 1959 Section 1.100 was amended to provide that the effective date of the 1960 decennial census is July 1, 1961, except for certain purposes not here relevant, with respect to which the effective date of such census is January 1, 1961.

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It is our view that neither the Secretary of State nor the official body charged with the official duty of redistricting may ignore the fact that the census has been "taken". Hence, if Section 22.050 is construed to mean that the Secretary of State may not certify the necessary information until after July 1, 1961, Section 22.050 would be contrary to the constitutional mandate, and hence invalid. It was, therefore, the duty of the county court or board of election commissioners of the City of St. Louis to proceed diligently to make the necessary redistricting upon receipt of the certification by the Secretary of State, without waiting until July 1, 1961. In St. Louis County, this duty is imposed on the county council, "which said council under the special charter of said St. Louis County exercises all the powers and performs all the functions of a county court". State ex rel McNary v. Mooney 247 S.W. 2d 726; State ex rel Wulfin v. Mooney 247 S.W. 2d 722.

It is noted that Section 22.050 RSMo 1959 provides that the division into districts shall be made "within sixty days" after receipt of official information from the Secretary of State of the number of representatives to be elected in the respective counties and in the City of St. Louis. The language of the statute is clear and explicit. The intent thereof is that upon receipt of the certification from the Secretary of State the body charged with the duty of redistricting promptly proceed to effect such redistricting and devote all such time and attention thereto as is necessary to complete the same, if at all possible, within the 60 day period provided for. It is our further view that the requirement that the redistricting be effected within 60 days is directory, so that in the event the requisite body is not able to complete such redistricting within the period provided for, a redistricting effected after such date would be valid. See Preisler v. Doherty, 284 S.W. 2d 427 which involved the division of the City of St. Louis into senatorial districts. In that case it was pointed out, l.c. 436: "Neither the Constitution nor the statute contain any provision terminating the authority and responsibility of the Election Board to make a legally proper redistricting. * * * We hold that the Board of Election Commissioners has a continuing duty to divide the City of St. Louis into senatorial districts complying with constitutional and statutory requirements."

In the Preisler case the court further pointed to the provisions of Section 10 of Article III to the effect that "such districts may be altered from time to time as public convenience

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may require" as evidence of the intention to provide for a continuing duty and obligation to make a valid redistricting. The cited provision of the constitution applies to representative as well as senatorial districts.

CONCLUSION

It is the opinion of this office that the county court or Board of Election Commissioners in the City of St. Louis (and the County Council of St. Louis County) has the duty to effect the redistricting of the Representative districts within 60 days from the date such body was officially informed of the number of representatives to be elected in the respective counties, and are not authorized to wait until July 1, 1961 to commence said redistricting. It is the further opinion of this office that such redistricting must be completed, if possible in the exercise of due diligence, within said 60 day period, but that if said redistricting has not been completed within said 60 day period the county court or board is under a duty to continue with said task until it is completed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:aa

SENATORIAL APPORTIONMENT
COMMISSION:
COMPENSATION OF MEMBERS:

Under provisions of Article III, Section 7, Constitution of Missouri, member of Senatorial Apportionment Commission shall be paid fifteen dollars a day from effective date of his appointment and qualification, until date commission completes assignment, but total compensation cannot exceed one thousand dollars. If commission's assignment is not completed and it is discharged at end of six month's period provided in section, a commissioner shall be paid fifteen dollars a day from effective date of his appointment and qualification, but total compensation cannot exceed one thousand dollars.

May 31, 1961

Honorable William E. Hilsman
Senator Third District
State Capitol
Jefferson City, Missouri



Dear Sir:

This office is in receipt of your recent request, reading as follows:

"The Senatorial Apportionment Commission appointed by the Governor is entitled to Fifteen Dollars (\$15.00) 'per day' according to Article three (3), Section seven (7) of the Constitution. Your opinion is requested as to whether this means that this amount is payable on each day from the date they are appointed and qualified until they have completed their assignment. It is my understanding that this has been the established customs in the Constitutional Convention and other similar bodies."

Article III, Section 7, of the Constitution of Missouri, provides for the appointment of a senatorial apportionment commission, the method of selection of members, their compensation, duties, and the effect of their action or inaction. Said Section reads as follows:

"Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor

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shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall re-apportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such reapportionment shall be subject to the referendum.

The above quoted section requires the commission to reapportion the senators by dividing the population of the state by the number thirty-four. The population of no district shall vary from the quotient more than one-fourth. The commission is also required to file a full statement of the number of the senatorial districts with the names of the counties included in such districts. Said statement shall be approved by at least seven commissioners, otherwise it is invalid. After the statement has been filed, senators shall be elected according to the districts set out in the statement, until a subsequent reapportionment will have been made in the same manner as provided in the section.

If the statement has not been filed within six months of the time fixed for the appointment of the commission, it

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shall stand discharged at the end of that period, and those senators to be elected at the next election, shall be elected from the state at large, following which a new commission shall be appointed in the same manner.

From Section 7 supra, it appears that the commission is granted a period of six months from the date fixed for appointment of the commission, in which to complete its work and file a statement with the Secretary of State. At the end of the six-month's period the commission is automatically discharged if it has not filed the statement with the Secretary of State.

It is apparent the section does not require the commission to take the full six-month's period to complete its work, but it is authorized, and may in its discretion, complete its work and file the statement in less than the six month time allowed it. In that event, upon filing of the statement the commission will also be discharged, since there is no reason for it to exist any longer.

We come now to the "compensation" portion of said Section 7, a construction of which has been asked in the opinion request. This portion of the section reads: "Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars."

Earlier portions of the section were expressed in clear and concise language, from which the intended meaning of the framers of the constitution could readily be ascertained, consequently, the ordinary rules of statutory construction did not apply and no reference was made to them in our previous discussion. However, this is not true regarding the meaning of said "compensation" portion of the section. While expressed in plain language, the intended meaning is not clear and it is believed necessary to employ such rules of statutory construction which may be applicable in an effort to determine, with any degree of accuracy the intended meaning of this part of the section.

In the case of *State v. Atterbury*, 300 S. W. 2d 806, the Supreme Court of Missouri held that the constitution is subject to the same rules of construction as other laws, with due regard to certain matters therein stated, and at 1. c. 810, said:

"The constitution, in general, is subject to the same rules of construction as other laws,

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due regard being given to its broader scope and objects, as a charter of popular government, and the intent of the organic law is the primary object to be attained in construing it. State ex rel. Harry L. Hussman Refrigerator & Supply Co. v. City of St. Louis, 319 Mo. 497, 5 S. W. 2d 1080, 1084 [4]. * * *

The general rule with reference to the payment of compensation to public officers is found in C.J.S., Vol. 67, Officers Section 83, and reads in part as follows:

"Where provision is made for compensation for a public office, the right to the compensation is an incident to the office or to the right or title thereto, and the person rightfully holding the office is entitled to the compensation attached thereto. In general, the right of compensation is not an incident of the exercise of the functions or the performance of the duties of the office; hence, in the absence of constitutional or statutory provision to the contrary, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office.
* * *

Again in the case of Nodaway County v. Kidder, 129 S. W. 2d, 857, the court gave the general rule, regarding the payment of compensation to public officers, and applied same to the factual situation involved in the case. At l. c. 860, it said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v.

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McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

From said section 7 supra, it clearly appears that public officers, known as commissioners of the senatorial apportionment commission, are to be appointed in the manner provided, to perform the duties therein specified. After appointment of the commission, its duties may be completed any time within six months from the date fixed for its appointment. At the end of that period, if the commission is still in existence, it is automatically discharged.

It also appears from the section, that commissioners are to receive compensation at the rate of fifteen dollars a day, although the beginning and ending dates are not indicated. Such payments are not conditioned upon the performance of any duties, nor is a commissioner required to meet certain preliminary requirements, such as satisfactory proof that he was present at each session of the commission, to entitle him to fifteen dollars for each day's attendance. The only limitation we find in the section is that each commissioner cannot be paid more than one thousand dollars, and it follows that such limitation would not permit him to receive fifteen dollars a day from the date fixed for appointment of the commission, until the automatic discharge of the commission, six months later.

We understand your inquiry to be primarily concerned with the beginning date of the fifteen-dollar a day payments to a commissioner.

As indicated above, the beginning and ending dates for such payments, are not given, and because of this omission, it is necessary for us to apply the general rules of statutory construction, given in above cited legal authorities, in order to determine the meaning of the "compensation portion" of Section 7, supra.

From the quotation of C.J.S. supra, we find that compensation is an incident to public office and the person

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rightfully (legally) holding the office is entitled to any compensation attached to it.

From Nodaway County v. Kidder, supra, we learn that a public officer is deemed to render official services gratuitous unless compensation for same has been legally provided. If compensation is allowed an officer by statute, in a particular mode or manner, he is entitled to compensation paid in the statutory mode or manner, and to no other. It is incumbent upon an official to point out the statute authorizing payment of compensation to him.

Only a commissioner who has been legally appointed to such office is entitled to the constitutional compensation. He has title to the office, and can legally hold the same when his appointment and qualification have become effective. From this date he can be paid compensation at the rate of fifteen dollars a day, until the commission has completed its assignment and filed the statement with the Secretary of State, if such duties will have been accomplished any time within the six-month's period allowed the commission or, in the alternative, each commissioner can be paid fifteen dollars a day from the effective date of his appointment and qualification, until the total payments amount to one thousand dollars. When that amount will have been paid to a commissioner, he cannot be paid any further compensation, and thereafter his services will be gratuitous until the commission has completed its assignment and ceases to function, or until the commission will have been automatically discharged at the end of the six-month's period.

CONCLUSION

Therefore, it is the opinion of this office, that under provisions of Article III, Section 7, Constitution of Missouri, a member of the Senatorial Apportionment Commission shall be paid compensation at the rate of fifteen dollars a day from the effective date of his appointment and qualification, until the date when the commission has completed its assignment, but total compensation paid to a commissioner cannot exceed one thousand dollars.

It is further the opinion of this office that although the commission's duties are not completed, and the commission is discharged at the end of the six-month's period provided by the section, that from the effective date of his appointment and qualification, a commissioner shall be paid compensation

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at the rate of fifteen dollars a day, but his total compensation shall not exceed one thousand dollars.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

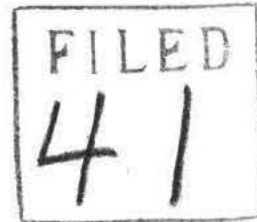
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FELONY:
STEALING:
EMBEZZLEMENT:
LARCENY:
THEFT:
CRIMINAL LAW:

A series of independent thefts or embezzlements by an individual from one owner at different times which thefts or embezzlements, independently, do not equal the sum of at least \$50.00, can be pleaded in the aggregate in order to charge the individual with stealing in a sum of at least \$50.00 under Section 560.156 MRSA 1959, only in the event that the facts would show a single criminal purpose on the part of the thief or embezzler at the time of the thefts or embezzlements.

March 6, 1961

Honorable Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Mr. Hoff:

This is in response to your letter of January 11, 1961, wherein you requested an official opinion of this office concerning the following:

"I would like to have your opinion on the following:

In a prosecution under the present stealing statute in which the defendant is charged with stealing under circumstances which would have constituted embezzlement by agent under the old law; is it possible to charge the defendant with the aggregate amount embezzled over a period of time, where the agent was in the continuous receipt of monies? Or would each act of embezzlement have to be prosecuted separately, as in other cases of stealing?

Where the agent is in continuous receipt of monies and fails to account for same and converts the same to his own use, would it be possible to prosecute on a felony charge if none of the several acts of embezzlement amounted to \$50.00, although the aggregate sum would be many times that figure?

In the case of Tucker vs. Kaiser, 176 SW 2nd 622 and in other cases, the court stated in effect that the embezzlement of different sums at different times constituted a continuing offense

Honorable Lewis B. Hoff

and the aggregate amount could be charged in the information.

In the case of State vs Woolsey, 324 SW 2d 753, the court stated that the purpose of the new stealing statute is to eliminate the technical distinctions between offenses of larceny, embezzlement and obtaining money under false pretenses. '

If the 'technical distinctions' were eliminated and the charge was stealing only, each of the embezzlements would constitute a separate crime and no reference to other thefts of similar nature and in the same general pattern could be introduced in evidence."

Section 560.156 MRSA 1959 states:

2. "It shall be unlawful for any person to intentionally steal the property of another, either without his consent or by means of deceit."

Said section became effective in 1955 (Laws 1955, p. 507).

In determining the scope and effect of Section 560.156, the Missouri Supreme Court, in State v. Zammar, 305 SW 2d 441, 10c. cit. 445, quoted the language of a Florida court, which had a stealing statute similar to ours.

" 'The real purpose of the statute was to eliminate technical distinctions between the offenses of larceny, embezzlement and obtaining money under false pretenses.....' "

This position was reaffirmed by the court in State v. Woolsey, 324 SW 2d 753.

The question now arises whether separate thefts or embezzlements from one owner which independently would not equal the sum of at least \$50.00, but would so in the aggregate, can be pleaded in the aggregate in order to charge one under the felony Section 560.156 MRSA 1959.

In 52 C.J.S., Larceny, Section 53, the general rule is stated thereby:

Honorable Lewis B. Hoff

"Where several articles are stolen from the same owner at the same time and place, only a single crime is committed, and the taking of separate articles belonging to the same owner from different places in the same building, pursuant to a single criminal impulse, usually is held to constitute only a single larceny. Where the property is stolen from the same owner and from the same place by a series of acts, each taking being the result of a separate, independent impulse, each is a separate crime; but where the successive takings are all pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act."

State v. Stegall, 226 SW 2d 720, involved a situation where defendant was charged with another with stealing 5800 pounds of iron and steel scrap metal of the value of \$125.00 from a certain company. This metal taken by defendant and his accomplice consisted of three small truck loads, two taken one night and the one taken the next night. It was all taken to the accomplice's home and deposited in one pile; then all transported in one large truck load to St. Louis and sold. In its opinion, the Supreme Court stated:

"Under the evidence the taking constituted but one transaction, as the result of one intent, and it was not error to charge the entire transaction in one count as a single larceny."

Although, Section 560.156 MRSA 1959, eliminated the technical distinctions between the offenses of larceny, embezzlement and obtaining money under false pretenses, a series of thefts or embezzlements by defendant from the same owner at different times could be pleaded in the aggregate in order to obtain the jurisdictional amount of at least \$50.00 only in the event that the facts disclosed a single criminal purpose on the part of the thief or embezzler.

CONCLUSION

It is the opinion of this office that a series of independent thefts or embezzlements by an individual from

Honorable Lewis B. Hoff

one owner at different times which thefts or embezzlements, independently, do not equal the sum of at least \$50.00, can be pleaded in the aggregate in order to charge the individual with stealing in a sum of at least \$50.00 under Section 560.156 MRSa 1959, only in the event that the facts would show a single criminal purpose on the part of the thief or embezzler at the time of the thefts or embezzlements.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

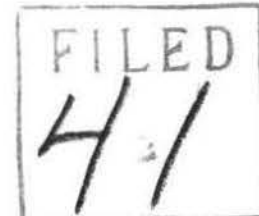
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COUNTY OPTION DUMPING GROUND LAW:
STATE DIVISION OF HEALTH:
COUNTY COURT:
MUNICIPAL CORPORATIONS:
"PERSON":

Both State Division of Health and County court have authority to enforce provisions of sections 64.460 to 64.487, MoRS 1959; all disposal areas outside the limits of cities, towns and villages must be licensed. Any person who disposes of ashes, garbage, rubbish or refuse in an unlicensed area is guilty of a misdemeanor.

April 4, 1961

Honorable William W. Hoertel
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Mr. Hoertel:

This is in response to your request for an opinion dated January 17, 1961, which reads, in part, as follows:

"This letter is a request for an Attorney General's opinion concerning the County Option Dumping Law, Sections 64.460-487, R. S. Mo. 1949. The County Court of Phelps County has been confronted with a dumping ground problem for some time, and their request is that I find out from you if and when the Court accepts the County Option Dumping Law, whether or not the Missouri State Health Department will have jurisdiction, and as a matter of practice will enforce this county law. If the State Health Department does not have the authority, then will the County Court of Phelps County have the authority to enforce the law?

"A second problem involves the fact that Phelps County has three reasonably large communities, to-wit: St. James, Newburg, and Rolla. It is my understanding that Newburg and St. James are completely satisfied with their dumping areas and methods. However, Rolla is not. Therefore, we would like to know if the law is accepted by the County Court whether or not we must force St. James and Newburg to comply along with the City of Rolla. It is my understanding that to force St. James and Newburg to comply would create a hardship upon them."

Honorable William W. Hoertel

The County Option Dumping Ground law was enacted in 1955 and is a comparatively new law in Missouri. Only a few counties in the state have placed the law in operation and there are no reported cases dealing directly with this law. Therefore, a determination of your questions must be made by a reading and interpretation of the statute itself.

Your first question is whether the Missouri State Health Department or the county court has the jurisdiction and authority to enforce the law. The provisions of the law relating to this question are as follows:

Section 64.467.

"1. Any person desiring a license to operate a disposal area shall make application therefor to the county court on forms provided by it."

Section 64.470.

"1. Upon receipt of the application the county court shall notify the state division of health which shall inspect the proposed site and determine if the proposed operation complies with sections 64.460 to 64.487 and the rules and regulations adopted pursuant thereto.

"2. If the division of health reports favorably on the application, and the county court finds that the applicant is a responsible and suitable person to conduct the business, then the county court shall issue a license to the applicant.

"3. All licenses shall expire one year after issuance but may be renewed upon payment of an annual fee of twenty-five dollars."

Section 64.473.

"The county court may revoke any license, after reasonable notice and hearing if it finds that the disposal area is not operated in a sanitary manner as required in sections 64.460 to 64.487."

Section 64.477.

"The state division of health shall prepare and publish rules and regulations which

Honorable William W. Hoertel

shall contain sanitary standards for disposal areas. The division of health shall inspect all licensed disposal areas and enforce all provisions of sections 64.460 to 64.487."

Section 64.487.

"Any person violating sections 64.460 to 64.487 shall be guilty of a misdemeanor."

From a reading of Sections 64.467(1) and 64.473, V.A.M.S., 1949, Laws of Missouri, 1955, page 348, quoted above, it is clear that the county court has the jurisdiction and authority to issue a license to operate a disposal area and to revoke that license if the disposal area is not operated in a sanitary manner as required. It is equally clear from a reading of Section 64.470, quoted above, that the State Division of Health has the jurisdiction, authority and duty to inspect the proposed site and make a report thereon. Section 64.477 directs the State Division of Health to prepare and publish rules and regulations and places upon the Division of Health the duty to enforce all provisions of the County Option Dumping Ground law. It is clear that both the county court and the State Division of Health have authority to enforce this law. The county court can enforce it in the process of issuing a license and revoking the license for failure to comply with the law. The State Division of Health has the duty and authority to promulgate rules and regulations and to enforce all of the provisions of the law.

You have asked whether the Health Department, as a matter of practice, will enforce this law. The Missouri Division of Health has promulgated rules and regulations governing refuse disposal areas and prepared inspection records, and has made inspections under this law. A copy of these rules and regulations is attached for your information. In sending you these regulations, this office is in noway attempting to prognosticate any further action by the State Division of Health, but we are simply calling your attention to things which have been done in the past.

One further method of enforcement is contained in Section 64.487, which provides that any person violating these sections shall be guilty of a misdemeanor, and therefore the prosecuting attorney of the county can also prosecute for violations and thereby enforce the County Option Dumping Ground law.

Your second question concerns the possibility of forcing cities within the county to comply with the law. The provisions of the law relative to this question are as follows:

Section 64.480.

"Sections 64.460 to 64.487 shall not be construed to prohibit any person from disposing of any ashes, garbage, rubbish or refuse from his own household upon his own land as long as such disposal does not create a nuisance. Sections 64.460 to 64.487 shall not apply to any disposal area operated by or under the control of any city, town or village and being located within the boundaries of such city, town or village."

Section 64.463.

"No person shall dispose of any ashes, garbage, rubbish or refuse at any place except a disposal area licensed as provided in sections 64.460 to 64.487."

Section 64.467.

"Any person desiring a license to operate a disposal area shall make application therefor to the county court on forms provided by it."

Section 64.487.

"Any person violating sections 64.460 to 64.487 shall be guilty of a misdemeanor."
(Emphasis supplied.)

From the context of the entire law, it is felt that the law is not designed to regulate a city garbage disposal system as such, but it is designed to regulate areas used as dumping grounds. Section 64.480 specifically exempts any disposal area operated by or under the control of any city which is located within the boundaries of such city from the operation of the law. The remaining sections quoted above apply to persons operating a disposal area or disposing of rubbish or refuse. These sections of the law are clear in exempting a city-operated disposal area within the boundaries of such city and they are also clear in applying to any person operating a disposal area anywhere in the county, with the exception of the disposal of rubbish or refuse by a person upon his own land from his own household. The real question involves the situation of a disposal area or dumping ground outside the city limits of a city which may be leased to or owned by the city and which is operated and controlled by the city. A general rule of statutory construction is found in 82 C.J.S., Section 382, page 894, where we find the following:

" * * * Another generally accepted rule of construction is that an exception of a particular thing from the general words shows that, in the opinion of the law-giver, the thing excepted would be within the general provision had not the exception been made. * * *"

A principle of law applicable to municipalities is found in 62 C.J.S., Section 3(c), page 73, where it is said:

"Municipal corporations have been held included within the term 'person,' at least in their private capacities, although not when such construction is not made imperative from the context or intent with which the word 'person' is employed. * * *"

The provisions of Section 64.480 exempting from the operation of the County Option Dumping Ground law a disposal area operated by or under the control of a city, town or village which is located within the boundaries of such city, town or village, make clear the legislative intent that all disposal areas outside the limits of cities, towns and villages are subject to the provisions of the County Option Dumping Ground law in any county to which such law is applicable, and therefore all disposal areas outside the limits of cities, towns and villages must be licensed under the provisions of the County Option Dumping Ground law (where such law is applicable) regardless of who owns, operates or controls such disposal areas.

Under the provisions of Section 64.463, supra, no person shall dispose of ashes, garbage, rubbish or refuse at any place except a licensed area, except under the provisions of Section 64.480 which provide that such person may dispose of ashes, garbage, rubbish or refuse from his own household upon his own land if such disposal does not create a nuisance.

Therefore, any person, which term would include an employee of a city, who disposes of ashes, garbage, rubbish or refuse in an unlicensed disposal area outside of the limits of a city, town or village, except a person who disposes of ashes, garbage, rubbish or refuse from his own household on his own land, would be subject to prosecution for violation of the provisions of Section 64.487.

We do not deem it necessary to determine in this opinion whether or not a city would be subject to being fined as a result

Honorable William W. Hoertel

of a conviction in a criminal prosecution for operating an unlicensed disposal area outside the city limits in a county where the County Option Dumping Ground law is in effect, and we do not rule on such question. On October 3, 1956, this office issued an opinion to Honorable H. K. Stumberg, Prosecuting Attorney of St. Charles County, a copy of which is enclosed for your further information.

CONCLUSION

It is the opinion of this office that the State Division of Health and the county court of a county to which the provisions of the County Option Dumping Ground law are applicable have the authority to enforce the provisions of such law.

It is further the opinion of this office that all disposal areas outside the limits of cities, towns and villages in counties in which the County Option Dumping Ground law is in effect must be licensed. Any person, including an employee of a city, town or village, who disposes of ashes, garbage, rubbish or refuse in any unlicensed disposal area outside the limits of a city, town or village is guilty of a misdemeanor, except that such person may dispose of ashes, garbage, rubbish or refuse from his own household on his own land if such disposal does not create a nuisance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

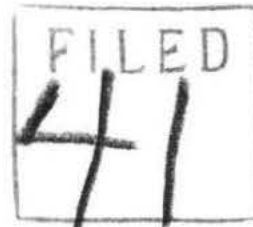
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Encs

Opinion No. 280
answered by letter

September 12, 1961

Honorable William W. Hoertel
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Mr. Hoertel:

As we understand your letter Phelps County does not have a County Health officer or a regular mill tax County Health Unit. The State Legislature has prescribed the methods to be used in setting up a County Health Unit or a County Health Officer and the county is not permitted to adopt some entirely different procedure.

We suggest that the County can easily come into compliance with the law by hiring a County Health Officer (under whom the sanitarian can work) or by creating a statutory County Health Unit. In this connection we are enclosing a copy of our opinion rendered July 19, 1961.

You also raise the question as to whether you have authority to employ a Public Health Nurse. This depends on the procedure which you have employed. This question is answered in an opinion rendered by our office on December 23, 1953, copy of which we are also enclosing.

The question of whether the secretary is legally employed is only incidental since the legality of her employment depends on whether her administrative superior is properly employed.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:MW

Enclosures

TAXATION:
LANDLORD AND TENANT:
FRATERNITIES:

Building used to house a college social fraternity is not used for charitable or educational purposes within the meaning of Section 6 of Article X of Missouri Constitution. Corporation leasing such property from exempt governmental agency is liable for taxes to extent of its interest therein.

October 19, 1961



Honorable William W. Hoertel
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which request is as follows:

"As you know, the Missouri School of Mines is located at Rolla, and in connection therewith there are several fraternities and fraternity houses. The Kappa Alpha fraternity is now living in a new house, which has been built on land owned by the University of Missouri, School of Mines and Metallurgy, and is leased to the Student Education and Loan Foundation for 100 years. This Foundation was organized in 1947 pursuant to Chapter 352 of what is now revised statutes of 1959. The Foundation claims to be a charitable organization for the purpose of obtaining money and erecting the present Kappa Alpha fraternity house. This Foundation in turn has leased the building to the Kappa Alpha fraternity for a period of 3 years, with perpetual 3 year options.

"The question is, therefore, whether or not this allegedly charitable organization, the said Student Education and Loan Foundation, is taxable by the County of Phelps with regard to the real estate it owns, considering that it is first an alleged charitable organization, and second that the building is on government owned land."

Honorable William W. Hoertel

Two questions are inherent in your request:

1. Whether the property is exempt as being used for charitable or educational purposes?
2. If not, what is the tax status in view of the University's interest therein?

Section 6 of Article X of the Missouri Constitution is as follows:

"All property, real and personal of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

An examination of the charter of the Students' Education and Loan Foundation shows that the corporate purposes there stated are purely charitable and educational. However, it is clearly set out in the above-quoted constitutional provision that it is the character of the use to which property is subjected that is determinative of its tax-exempt status. Hence, irrespective of the corporate aims of the Foundation, it must first be determined whether the building in question is being used exclusively for religious, educational, or charitable purposes.

While the Missouri Supreme Court has never had occasion to consider the nature of a use of property by a Greek-letter college fraternity with regard to an exemption from taxation, the question has arisen in a number of other states. The courts of those states have been nearly unanimous in holding such property to be taxable under constitutional provisions identical to ours. The rule is stated in an annotation in 66 ALR 2d 904 as follows:

Honorable William W. Hoertel

"With few exceptions the courts have held that college fraternities and sororities are not exempt from taxation, because they exist primarily for the convenience of their members, and are mainly concerned with providing them with board, lodging, and recreation, while any educational, charitable, and benevolent purposes are of secondary importance."

In *Iota Benefit Ass'n v. Douglas County*, 165 Neb. 330, 85 NW2d 726, a fraternity was composed exclusively of medical students who shared a house. It was contended that the association of those studying the same profession, occasional lectures on medical subjects given at the house, and other professional benefits were such as to exempt the property from taxation as being used exclusively for educational purposes. The Court held that, despite these factors, the primary purpose of the fraternity was to provide a private boarding house and dormitory for its members and therefore its property was not exempt.

In *People v. Alpha Pi*, 326 Ill. 573, 158 NE 213, the Court decided that although the fraternity relieved the university by providing rooming facilities for men, it did not come within a statute exempting property used exclusively for beneficent and charitable purposes.

In view of the foregoing, it is the opinion of this office that a building used to house a college social fraternity is not being used exclusively for charitable or educational purposes within the meaning of Section 6 of Article X of the Constitution and is therefore not exempt from taxation under that section.

The remaining question, whether the Foundation is exempt from taxation as the lessee of an exempt governmental agency, is controlled by our Supreme Court's decision in *State ex rel. Benson v. Personnel Housing Corporation, Mo.*, 300 SW2d 506. In that case, the defendant, a private housing corporation, leased from the United States a housing project owned by the Federal Government and constructed on Government-owned land. The lease was for a period of 75 years while the estimated life of the buildings was 35 years. The Court held that the interest of the lessee corporation was taxable and was properly assessed as real estate. In view of that decision, it is our opinion that the Foundation's interest as lessee of the property here in question is taxable.

Honorable William W. Hoertel

CONCLUSION

A building used to house a college social fraternity is not exempt from taxation under Section 6 of Article X of the Constitution of Missouri. The interest of the Students' Education and Loan Foundation in such property is subject to taxation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

BAIL:
SHERIFF:
MAGISTRATE:
ARREST:

Supreme Court Rule 37.485 empowers the sheriff of the county in which the offense was committed, to set and take the amount of bail, which shall not be less than sixteen dollars nor more than two hundred dollars in accordance with the bail schedule established by the magistrate having jurisdiction over the offense, only in those cases where the magistrate court is not in session at the time, and the arrest of the person is without a warrant for a misdemeanor involving the operation of a motor vehicle.

November 8, 1961



Honorable Fred L. Howard
Secretary
Missouri Highway Reciprocity Commission
1004 Jefferson Building
Jefferson City, Missouri

Dear Mr. Howard:

This is in reply to your request for an opinion, wherein you state:

"We have had some complaints from various counties of the state that certain Magistrates are attempting to prevent Sheriffs from setting bonds in traffic cases pursuant to Supreme Court Rule 37.485. It seems that some Magistrates have adopted other plans for the making of bonds when court is not in session, which plans are not authorized by either statute or rule. It also appears that some Magistrates are not satisfied with the performance of the Sheriff and therefore attempt to prevent him carrying out the authority conferred by said rule 37.485."

Supreme Court Rule 37.485 states, in part, as follows:

"(a) Whenever any officer shall arrest a party without a warrant for a misdemeanor involving the operation of a motor vehicle at a time when the magistrate court of the county in which the offense occurred is not in session, the sheriff of the county in which the offense was committed may take bail which shall not be less than sixteen dollars nor more than two hundred dollars in accordance with the bail schedule established by the magistrate having jurisdiction over the offense. . . ."

Basically, when a person is arrested without a warrant for a misdemeanor involving a traffic offense, he should be taken before a magistrate to make bail.

Supreme Court Rule 37.485 specifically provides for the manner in which bail may be made by a person arrested without a warrant for a misdemeanor involving a traffic offense when the magistrate court of the county in which the offense occurred is not in session. In such a situation Rule 37.485 provides that the sheriff of the county may take bail from such person. Such bail, however, shall not be less than sixteen dollars nor more than two hundred dollars in accordance with the bail schedule established by the magistrate. No other person, agent, attorney or what have you, is authorized to set or accept bail in this situation.

The Rule would appear to require the magistrate to establish a bail schedule for this purpose in order that the sheriff may follow it in establishing the proper amount of bail in such a situation.

CONCLUSION

It is, therefore, the conclusion of this office that Supreme Court Rule 37.485 empowers the sheriff of the county

in which the offense was committed, to set and take the amount of bail, which shall not be less than sixteen dollars nor more than two hundred dollars in accordance with the bail schedule established by the magistrate having jurisdiction over the offense, only in those cases where the magistrate court is not in session at the time, and the arrest of the person is without a warrant for a misdemeanor involving the operation of a motor vehicle.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

Anti-Trust:
MONOPOLIES:
PRICE FIXING:
AGREEMENT TO FIX PRICES:
COMBINATIONS IN RESTRAINT OF
TRADE:

An agreement by retail gasoline
filling stations to fix prices
at which they sell gasoline violates
the Anti-Trust Laws of Missouri
contained in Chapter 416, RSMo 1959.

December 11, 1961



Honorable John A. Honssinger
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Honssinger:

This office is in receipt of your request for an opinion
dated December 1, 1961, which reads as follows:

"The various retail service stations here
in Lebanon, Missouri, representing various
oil companies desire to organize and band
together for the purpose of voluntarily
establishing and agreeing upon the prices
to be charged for various grades of gaso-
line sold by them. As I have stated, such
an agreement would be strictly voluntary,
but would involve all service station
operators. Would such an agreement violate
the antitrust laws of this state?"

As we understand the factual situation you present it
is that all, or a part of, the retail service stations plan
to agree to establish the price at which each of them will
sell gasoline. Your inquiry is whether or not this arrange-
ment or agreement, even though voluntarily entered into by
each of them, would violate the Missouri Anti-Trust Laws.

As we understand the proposition you present, it amounts
to an agreement between retail filling stations, who are com-
petitors of one another, to fix the price at which gasoline
will be sold at each of their stations. This is what is known
in the cases as "horizontal price fixing".

Chapter 416, RSMo 1959, deals with monopolies, discriminations
and conspiracies. Section 416.020 reads as follows:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any other person or persons to regulate, control or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining, or any article or thing whatsoever, of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or participate in any pool, trust, agreement, contract, combination, confederation or understanding, to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightening or storm, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and be punished as provided for in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400."

The Supreme Court of Missouri in the most recent case on this subject, *Temperate v. Horstman*, 321 SW2d, 1. c. 662, 663, referred to the case of *State ex inf. Dalton v. Miles Laboratories*, 365 Mo. 350, 282 SW2d 564, and discussed the so-called "vertical price fixing" in both cases and held that our statutes prohibit both "vertical" and "horizontal" price fixing. In the *Temperate* case 1. c. 662, the Court said:

"***This type of price-control provision may be described as 'vertical price fixing,' discussed and condemned in *State ex inf. Dalton v. Miles Laboratories*, Banc, 365 Mo. 350, 282 SW2d 564. In our case the contract itself bespoke price fixing; in the *Miles* case the practice was deduced from the evidence of activities. As the court there said, our statutes are so explicit and all inclusive that there is no room left for construction by the courts; the court said further, *loc. cit.* 573: '*** Section 416.010 and 416.020

denounce and condemn any person entering into any combination, agreement or understanding with any other person or persons (note the use in the disjunctive of both singular and plural) in restraint of trade or competition or to regulate, control, fix or maintain the price of any article; and, Section 416.040 is directed against all arrangements, contracts, agreements, combinations or understandings between any two or more persons designed or tending to lessen full and free competition in, or to increase the market price of, any product. ***' It was specifically held that our statutes are not aimed solely at combinations of competitors of 'horizontal' price fixing. Section 416.040 specifically declares void 'all *** contracts *** between any two or more persons *** which tend to lessen *** full and free competition in the *** sale *** of any product *** and *** contracts *** made with a view to increase, or which tend to increase, the market price of any product ***.' Section 416.020 declares that any person who agrees with any other person to 'regulate, control or fix the price of any article *** commodity *** bought and sold ***' is guilty of a conspiracy in restraint of trade and shall be punished therefor. These, together with Sections 416.010 and 416.110 must be construed together as a declaration of policy. The last cited section specifically declares that all contracts made in violation of any of the provisions of Chapter 416 are void. And see, generally, State ex rel. Taylor v. Anderson, 363 Mo. 884, 254 SW2d 609; State ex inf. Major v. Arkansas Lumber Co., 260 Mo. 212, 169 SW 145; and Finck v. Schneider Granite Co., 187 Mo. 244, 86 SW 213 (involving an attempt to recover under an illegal contract). The test is not whether the agreement unreasonably lessens competition or increases prices. State ex rel. Barrett v. Boeckeler Lumber Co., 301 Mo. 455, 256 SW 175; and these statutes would seem to permit of no exception by reason of the amount or degree of restraint or the volume of business affected. State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 246 Mo. 168, 151 SW 101. It is not necessary to find a monopoly or a possibility of monopoly in order to find a violation; the statutes do not so require. We do not mean to say that a mere incidental uniformity of prices establishes, in itself, an unlawful agreement or understanding, State ex rel. Taylor v.

Honorable John A. Honssinger

-4-

Anderson, 363 Mo. 884, 254 SW2d 609. But here we have an express agreement in writing for the control of retail prices, plus at least some active steps in enforcement. ***"

In the situation which you present, as we understand it, it is the opinion of this office that the agreement proposed by the retail filling stations would be in direct violation of the Anti-Trust Laws of Chapter 416, RSMo 1959.

CONCLUSION

It is therefore the opinion of this office that an agreement among retail filling stations to fix the price at which gasoline will be sold at each of their stations, violates the Anti-Trust Laws of Missouri contained in Chapter 416, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:jh

COUNTIES:

COUNTY COURTS: :

COUNTY CLERKS:

Presiding judge of county court is without authority to order clerk to make a record entry showing the judge's presence during a previously adjourned session of the court. Presiding judge, acting alone, may not order clerk to issue a warrant.

April 21, 1961



Honorable Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Mr. Hutchison:

We have your letter of recent date which reads as follows:

"The Presiding Judge of Maries County is employed six days a week in a town about twenty miles from Vienna. I understand he gets off work around 3 p.m. The other two Judges have been holding Court and the Presiding Judge has been coming by after one or both the Judges have gone home.

"My questions are these: Can the Presiding Judge demand that the County Clerk show in the Court Minutes that he was present on that day of Court?

"Can the Presiding Judge demand that a warrant be issued by the Clerk for his attendance in Court under the above circumstances?"

Section 7, Article VI, Constitution of Missouri, 1945 provides in part that "In each county not forming and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings." (Emphasis Supplied). Section 51.120, RSMo 1959, requires that the clerk of the county court "shall keep an accurate record of the orders, rules, and proceedings of the county court." (Emphasis supplied). Thus it would appear that the principal criterion against which record entries are to be measured is accuracy.

Because of the ministerial nature of the office of clerk as well as the greater dignity of constitutional over statutory provisions, the responsibility for reducing the proceedings to an accurate account would devolve primarily upon the court; and the functions

Honorable Harold S. Hutchison

of the clerk in this respect would necessarily be performed subject to the direction and control of the court. It has been held that "The office of the clerk of the County Court is essentially ministerial in its character. So far as the entry of the orders of the court are concerned, or the performance of any other act or thing which may be legally and properly required of him by the court, he is without discretion; he has no power to judge of the matter to be done and must obey the mandates of the tribunal whose officer and servant he is." State ex rel. Attorney General v. Bowen, (1867) 41 Mo. 217, 219.

But just as the clerk may not sit in judgment of whether a properly directed entry is "accurate" it is equally apparent that the clerk has no authority to make an entry when it is not directed by the court, either by expressed or implied order.

In this connection, it has been made clear that county court judges, acting alone or together, act in their individual capacities when the court is not in session. In Carter v. Reynolds County, (Mo. Sup. 1926) 288 SW 48, the plaintiff attempted unsuccessfully to recover five hundred dollars as payment for driving piling in the Black River to keep it from changing course. The court had made an order offering this amount to anyone who would accomplish the work. After the order was promulgated, one of the judges wrote to the plaintiff and instructed him to perform the job. Holding that this letter was not a record of the county court and that the court's order was too vague to be made the basis of an enforceable contract, our Supreme Court ruled that the judge's membership on the county court did not, of itself, "constitute him 'an agent authorized by law' to make contracts for the county. If all three of the judges of the county court had separately agreed with plaintiff that the county would pay him \$500.00 for driving piling in Black River, the county would not be bound. They could act for and obligate the county only when sitting as the county court; " l.c. 50.

The Kansas City Court of Appeals took the same position thirty years later in State ex rel. Walton v. Miller, (Mo. App. 1956) 297 SW 2d 611, wherein Walton sought a writ of mandamus to compel the presiding judge of a county court to sign a warrant to pay Walton for certain work allegedly performed in compliance with a contract between Walton and the County. There was no written contract in the case, but the facts established that Walton had agreed to do the work in response to a request made by the two associate judges during a conversation with them in the court house. They not only authorized the work but set his compensation at \$500.00.

On the issue of whether two associate judges could act as the county court under these circumstances, the Kansas City Court of Appeals

Honorable Harold S. Hutchison

said, l.c. 614, 615, "* * *they were acting in their individual capacity and they were not, under such circumstances, the authorized agents of the county respecting the transaction. 'A county court performs its functions as a constituted body. Its three members acting individually have no power to obligate the county.'" (Citing Missouri Kansas Chemical Co. v. Christian County, 180 SW 2d 735, 736).

In the Missouri-Kansas Chemical Co. case, the Supreme Court held that the plaintiff could not recover against the county where the cause of action arose from contracts made by the court house janitor and the presiding judge of the county court. With regard to the judge's authority to enter into a contract by which the county would be bound, the Court held, l.c. 736, "He likewise was not the agent of the county, nor did he have authority in his individual capacity as presiding judge to make a contract on behalf of the county court."

Thus it is firmly established that the county court must act as a body legally assembled, and that the acts of the members in their private capacities are not acts of the court. The only exception to this rule revealed by our research is that set out by Section 49.070, RSMo 1959, which permits a single member of the court to "adjourn from day to day, and require the attendance of those absent; * * *"

Therefore, it could certainly be argued that when the presiding judge of Maries County appears after the court has adjourned for the day, he is acting in his individual capacity as to the clerk and may not properly compel the entry of any matter into the minutes of the court. This would be true even if one or both of the other judges were physically present in the court house, because they too would be in their individual capacities subsequent to adjournment.

In response to the second portion of your question, let it be said that a presiding judge acting alone can never order the issuance of a warrant. Section 51.150, RSMo 1959, directs the clerk "To issue warrants on the treasury for all moneys ordered to be paid by the court, * * *" (Emphasis supplied). As indicated above, the only interpretation that may be placed on the word "court" is a majority of the court legally convened. Therefore, an order from the court, as opposed to that of an individual member, is required prior to the issuance of a warrant.

Implicit in the second part of your inquiry is the more fundamental question whether the presiding judge is entitled to compensation for days when he arrives after adjournment of the county court. For that reason, we have attached herewith an earlier opinion of this office which we believe to be dispositive of that issue. In that opinion, prepared at the request of Elton A. Skinner and forwarded under date of November 27, 1951, one of the conclusions was "that

Honorable Harold S. Hutchison

a county judge in a county of the third class must actually be present and attend court to be compensated therefor." The statute upon which that conclusion was based is essentially the same as Section 49.120, RSMo 1959, which governs the compensation of judges of county courts of class four counties.

CONCLUSION

It is the opinion of this office that, under the circumstances outlined in your letter, the presiding judge is without authority to order an entry in the record of the county court reflecting his presence during the previously adjourned session of court.

We are also of the opinion that a presiding judge, acting alone, may not properly order the issuance of a warrant by the county clerk.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Very truly yours,

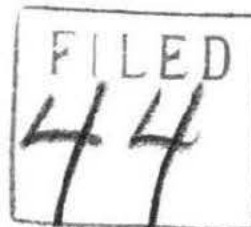
THOMAS F. EAGLETON
Attorney General

AJS:cr
Enc.

STATE DIVISION OF RESOURCES
AND DEVELOPMENT:
RESOURCES AND DEVELOPMENT:

The division of resources and development has authority to provide planning assistance to any county, municipality, or metropolitan area and exercise all the power and authority granted under the provisions of Sections 255.130, 255.140, and 255.150, RSMo 1959.

September 20, 1961



Honorable James D. Idol, Director
Missouri Resources and Development
Commission
Jefferson Building, Eighth Floor
Jefferson City, Missouri

Dear Mr. Idol:

This will acknowledge receipt of your opinion request of August 31, 1961, which reads as follows:

"In order to comply with the federal requirements for an application for Urban Planning in the Metropolitan St. Louis Area, your opinion is hereby requested as to the authority of this division to perform such work, as provided by Sections 255.130, 255.140, and 255.150, Revised Statutes."

The above mentioned sections were enacted by the Legislature in 1959, Laws of Missouri, 1959, Senate Bill 52, paragraph 1. It is the fundamental principle of statutory construction that an act of the legislature, since it represents the will of the people, carries a presumption of constitutionality and should be recognized and enforced unless it is plainly and palpably a violation of the fundamental law of the constitution. *Bowman v. Kansas City*, 233 S.W. 2d 26.

A discussion with you revealed that an application has been made for an over-all storm water study for the Metropolitan St. Louis Area in conjunction with the Metropolitan St. Louis Sewer District. It is our opinion that the Division of Resources and Development is the official state planning agency for the State of Missouri.

1. Section 255.150 of the Revised Statutes of Missouri, 1959, provides as follows:

"The state division of resources and development is hereby designated as the official state planning agency for the

Honorable James D. Idol

purpose of providing planning assistance to counties, municipalities and metropolitan planning areas, and for such purposes is hereby authorized and empowered to:

"(1) Contract with public agencies or private persons or organizations for any of the purposes of sections 255.130 to 255.150;

"(2) Delegate any of its functions to any other state agency authorized to perform such functions, except that responsibility for such functions shall remain solely with the division;"

2. It is the opinion of this office that the Division of Resources and Development is authorized under the existing state law to perform planning work in the area referred to in the application for the 701 Planning Grant to make an over-all storm water study for the Metropolitan St. Louis Area in conjunction with the Metropolitan St. Louis Sewer District. The authority for this is contained in Section 255.130 of the Revised Statutes of Missouri, 1959, as follows:

"The state division of resources and development is hereby authorized, upon the request of the governing body of any county, municipality or metropolitan area in this state to:

"(1) Provide planning assistance (including planning surveys, land use studies, urban renewal plans, technical services, and other planning work, but excluding plans for specific public works) to and for any county or municipality, or metropolitan area.

"(2) Contract for, receive, and utilize any grants or other financial assistance made available by the federal government or from any other source public or private, for the purpose of sections 255.130 to 255.150."

3. It is the opinion of this office that the proposed storm water survey for the Metropolitan St. Louis Area is within the purview of Section 701 of the Federal Housing Act, 1954, as amended. The reason for this opinion is that it has been

Honorable James D. Idol

explained to this office that this storm water study is an essential part of an over-all plan for the Metropolitan St. Louis Area.

It is further my understanding that this survey does not contain any plans for specific public works which are prohibited by Section 701 of the Federal Housing Act, 1954, as amended.

4. Sections 255.130 and 255.140 of the Revised Statutes of Missouri, 1959, authorize the Division of Resources and Development to contract with the Federal Government, and also the Metropolitan St. Louis Sewer District, to provide the planning storm water survey for the Metropolitan St. Louis Area. Section 255.130 of the Revised Statutes of Missouri, 1959, provides as follows:

"(2) Contract for, receive, and utilize any grants or other financial assistance made available by the federal government or from any other source public or private, for the purpose of sections 255.130 to 255.150."

5. Section 255.150 of the Revised Statutes of Missouri, 1959, provides as follows:

"All matching nonfederal funds required for any planning assistance undertaken by the state division of resources and development pursuant to sections 255.130 to 255.150 shall be provided by the county, municipality or metropolitan area requesting such planning assistance."

This Section requires that all matching nonfederal funds required for this project be provided by the municipality or metropolitan area requesting such planning assistance, in this case the Metropolitan St. Louis Sewer District.

The Division of Resources and Development of the State of Missouri is presently negotiating a contract with the Metropolitan St. Louis Sewer District to provide the necessary matching nonfederal funds required for Project No. Mo. P-2 and the Board of Trustees of the Metropolitan St. Louis Sewer District has adopted the attached Resolution No. 448.

This Resolution provides that the Metropolitan St. Louis Sewer District has the necessary nonfederal matching funds available for the purpose of paying all necessary nonfederal costs to carry out the storm water survey as contained in the application of the Missouri Resources and Development.

Honorable James D. Idol

In conjunction with this opinion, I think it relevant to note that the last General Assembly of the State of Missouri has amended Chapter 255, which applied to the Division of Resources and Development, to provide that effective October 13, 1961, the duties and functions of the Division of Resources and Development are to be transferred to the new Division of Commerce and Industrial Development. The new act provides in part:

"2. All duties and functions otherwise provided by law to be performed by the division of resources and development shall hereafter be performed by the division of commerce and industrial development. The division of commerce and industrial development shall succeed to all other property, documents, records, assets and obligations of the division of resources and development.

"3. Insofar as practicable and desirable, all pending matters before the division of resources and development begun but not completed by that agency shall be completed by the division of commerce and industrial development."

CONCLUSION

It is, therefore, the opinion of this office:

1. The Division of Resources and Development of the State of Missouri is the official State Planning Agency for the purpose of providing planning assistance to counties, municipalities and metropolitan planning areas.

2. That the Division of Resources and Development is authorized under state law to perform work in the Metropolitan St. Louis Area, and in particular that work contained in the Division of Resources and Development application for a 701 Planning Grant to make a storm water survey within the Metropolitan St. Louis Area.

3. The planning work as mentioned in the application for a 701 Planning Grant, as aforementioned, is within the purview of the Federal law, namely, "surveys, land use studies, urban renewal plans, technical services and other planning work exclusive of plans for specific public works."

4. The Division of Resources and Development is empowered, in Chapter 255 of the Revised Statutes of Missouri, 1959, to

Honorable James D. Idol

fulfill the obligations imposed under the grant contract with the Federal government prescribing the terms and conditions thereof.

5. Section 255.150 provides, "All matching nonfederal funds required for any planning assistance undertaken by the state division of resources and development pursuant to sections 255.130 to 255.150 shall be provided by the county, municipality or metropolitan area requesting such planning assistance."

As previously mentioned in this opinion, all of the required nonfederal funds are available and will be provided by the Metropolitan St. Louis Sewer District according to Resolution No. 448, a copy of which is attached to this opinion.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

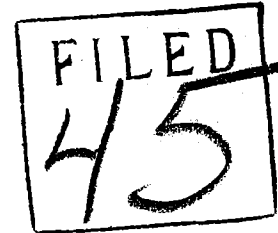
Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:BJ

CONSTITUTIONAL LAW: Constitutional prohibition against special
LEGISLATION: or local laws laying out roads, highways,
EASEMENTS: streets or alleys does not apply to private
STATE PARK BOARD: road.

May 10, 1961



Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1206 Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in answer to your request for an opinion, which request reads as follows:

"Attached please find a copy of Senate Bill No. 155, pertaining to a road easement at Lake of the Ozarks State Park. I should like to call your attention to the Constitution of Missouri, Article III, Section 40, Subsection 17. I am anxious to learn if Senate Bill No. 155 is in conflict with the Constitution of Missouri, and therefore unconstitutional."

The relevant portion of Senate Bill No. 155 reads as follows:

"Section 1. The State Park Board, on behalf of the State of Missouri, is authorized and directed to grant to Carl Hanks and Frances L. Hanks, his wife, their heirs and assigns, an easement for a forty foot roadway for the purpose of ingress and egress on, over, and across land owned by the State of Missouri in Camden County, Missouri, constituting a portion of Lake of the Ozarks State Park, more particularly described as follows: * * *."

Mr. Joseph Jaeger, Jr.

The constitutional provision to which you refer, Section 40(17) of Article III, is as follows:

"The general assembly shall not pass any local or special law:

* * * *

(17) Authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys."

In *Reals v. Courson*, 164 SW2d 306, 307, the Supreme Court described special legislation in the following terms:

"A statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is special * * *.

"The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes.

"If in fact the act is by its terms or 'in its practical operation, it can only apply to particular persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.'"

By this standard, the questioned act is undoubtedly special legislation. It relates not to a general class of persons but singles out particular individuals, and in so doing excludes all others.

All special legislation is not prohibited though; only that set out in Section 40 of Article III of the Constitution. While Senate Bill No. 155 does not specifically create a roadway, it would appear obvious that it "authorizes the laying out" of such a roadway within the meaning of Section 40(17) of Article III. Therefore, at first blush, the bill seems to

Mr. Joseph Jaeger, Jr.

violate the constitutional prohibition contained therein. However, a closer examination of the meaning of this constitutional prohibition leads to a contrary conclusion.

The primary rule of constitutional construction is that words are to be understood in their usual and ordinary sense. *Vanlandingham v. Reorganized School District*, 243 SW2d 107. Each of the terms used in Section 40(17), that is "roads, highways, streets or alleys," is ordinarily used to denote a public way. Elliott, in his *Treatise on Roads and Streets* (4th Ed.), defines highways as follows (Vol. 1, p. 1):

" * * * The term highway is the generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes, and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway. * * *"

The same writer defines streets as follows (Vol. 1, p. 20):

"A street is a road or public way in a city, town or village. A way over land set apart for public travel in a town or city is a street, no matter by what name it may be called; it is the purpose for which it was laid out and the use made of it that determines its character. * * *"

In *State ex rel. Wabash Ry. Co. v. Public Service Comm.*, 100 SW2d 522, 525, our Supreme Court considered these terms and said:

" * * * A road or a highway is nothing more than a strip of ground set aside, improved, and dedicated to the public for use as a passageway. * * *"

The Court of Appeals, in *Bailey v. Culver*, 12 Mo. App. 175, 183, discussed the commonly accepted meaning of the term "alley," saying that:

" * * * In his leases, the owner called it (the disputed strip) an 'alley;' and

Mr. Joseph Jaeger, Jr.

that word, when not qualified by the term private, is conventionally understood, in its relation to towns or cities, to mean a narrow street in common use. * * *

Another maxim of constitutional construction which may be applied to the section of the Constitution in question is that known as *noscitur a sociis*. The application of this rule was explained by the Supreme Court in *State ex rel. Crutcher v. Koeln*, 61 SW2d 750, 755, as follows:

"These words are found grouped together. In applying the maxim '*Noscitur a sociis*,' we may take it that such coupling together shows that the words are to be understood in the same general sense and are to be regarded as of the same nature. * * *

Applying the afore-mentioned rules of construction to Section 40(17) of Article III of the Constitution in the light of the authorities cited as to meaning, it is apparent that this section prohibits the Legislature from enacting special laws authorizing the laying out of public roads, etc. Senate Bill No. 155, by its terms, grants a roadway easement to the named grantees solely for private use, and therefore does not fall within the prohibition of Section 40(17) of Article III.

CONCLUSION

Senate Bill No. 155 is not violative of Section 40(17) of Article III of the Missouri Constitution, in that it authorizes the establishment of a private, rather than a public, road.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

8/15/61

This letter
revised letter
originally sent
out, attached
hereto

June 30, 1961

Honorable Darold W. Jenkins
Prosecuting Attorney
Saline County
Marshall, Missouri

FILED
45

Dear Darold:

This letter is in response to your opinion request dated February 20, 1961. In your letter you raise several questions, all of which I believe can be answered in this letter, therefore not necessitating a formal opinion.

The first question you ask concerns the language of a hypothetical information. In that information you are charging a defendant under the new stealing statute. You raise the question as to whether the stolen property must be itemized and its individual value stated in the information. After discussing this problem with several assistants on the staff, including our chief criminal assistant, we have come to the conclusion that the itemization of the stolen property is necessary to properly inform the defendant of the crime against him and allow him to prepare his defense. However, it may be necessary for the property to have its specific values listed. If the language of the statute is used, this would probably be all that would be necessary. As you may know, Section 560.160, RSMo 1959, uses language describing the property to be "less than fifty dollars" and "at least fifty dollars." We also are of the belief, however, that the listing of approximate values would probably be better practice than using the general statutory language.

In answer to your second question, I believe this is fully resolved in the recent case of State ex rel. Griffin vs. Smith, 258 SW2d 590. It is apparent after reading this case that the prosecuting attorney has a great deal of discretion in the prosecution or non-prosecution of criminal matters.

Honorable Darold W. Jenkins

#2

Your third question is a little more difficult to answer. As you have stated, the magistrate judge's authority to grant paroles is governed by Section 549.193, RSMo 1959. In that section you will note that it specifically states that the magistrate "shall have those powers granted to a circuit court in which there is no parole board, to parole any person or to place any person on probation." In my thinking, if the magistrate judge is to have the powers comparable to the circuit judge's, then it must necessarily follow that the magistrate judge must also be bound by the restrictions on this power by which the circuit judge is bound. Therefore, Section 549.080 and Section 549.070 must be read in conjunction with the statute quote above. In Section 549.080, applicable to felonies, it states that a parole may not be granted to a person previously convicted of a felony. In Section 549.070, applicable to misdemeanors, this restriction is not present. A magistrate may grant a bench parole to a person convicted of a misdemeanor in his court even though such person has been previously convicted of a felony.

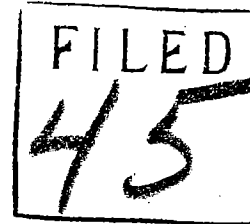
I hope our thinking in these matters substantially answers the questions raised in your letter.

You concluded your letter by stating there was "no particular rush about these questions." We, therefore, side-tracked your request in order to handle the numerous urgent requests from legislators on pending legislation.

Best personal regards,

THOMAS F. EAGLETON
Attorney General

TFE:oh;ml



July 26, 1961

Honorable Joe A. Jackson
Member, Missouri House of Representatives
Box 442
Grant City, Missouri

Dear Mr. Jackson:

This letter of advice, in lieu of a formal opinion, is in answer to your letter of July 19, 1961. You have indicated that you hold a personal check from an individual, drawn eight months ago, against the maker's bank account which still has funds, and that the bank refuses to honor the check though the maker has not stopped payment on the same.

Section 362.370 RSMo 1959, cited in your letter of inquiry, appears on its face to merely relieve a bank of any liability to its depositor as drawer of a check if it chooses to not honor the same after one year from the date the check was drawn, and does not create any obligation between the bank and the drawee of the check.

The following language from *Kline & Aitken v. Cantley*, Mo. App., 34 S.W. 2d 526, l.c. 527, will suffice to answer your inquiry:

"* * * in this state a suit by a holder of a check for less than the total deposit of the drawer will not lie against the bank on which it is drawn for refusal to pay it on presentment, even though the drawer of the check has, at the time, a sufficient sum to his credit in the bank to pay the check. A check for less than the whole amount on deposit is not an assignment pro tanto of the funds of the drawer on deposit in the bank, and confers no right of action upon the holder of the check against the bank."

Trusting that the above remarks will fully answer your inquiry, I remain

Yours very truly,

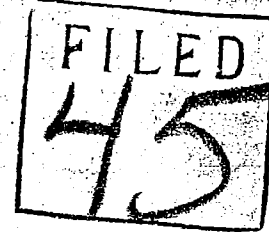
THOMAS F. EAGLETON
Attorney General

JLO:M:aa

SHERIFF:
COUNTY COURT:
TRAVEL ALLOWANCES:

The county court is not authorized to pay the sheriff's and deputies' travel allowances by giving them the equivalent of \$75.00 per month in gasoline instead of paying such allowances by the means directed by Sections 57.430 and 57.440, RSMo 1959.

October 12, 1961



Honorable Darold W. Jenkins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Jenkins:

In your letter of September 8, 1961, you request an opinion on the following matter:

"The County Court buys regular grade motor vehicle gasoline in bulk for use in County owned motor vehicles. This fuel is stored and distributed at the County Highway Shed.

"The County Court proposes to allow the Sheriff of this County, plus two Deputies, to use gasoline out of the County pump, and in return the Sheriff and Deputies will not be paid the \$75.00 monthly reimbursement for investigative automobile expense.

"It is proposed that a per gallon per vehicle record will be maintained, and that the Sheriff and Deputies will use the equivalent of the \$75.00 at the price per gallon the County pays for the gasoline. This procedure will allow the Sheriff and Deputies to obtain almost 1/3 more gasoline for the stipulated \$75.00 per month. The Sheriff and Deputies own their vehicles.

"We have an opinion from the Internal Revenue Service to the effect that so long as the Sheriff and his Deputies do not purchase the gas direct from

Honorable Darold W. Jenkins

the manufacturer or producer, and so long as the gas is used solely for the performance of official duties, excise tax would not be applied on the purchase by the County Court.

"Does the proposed procedure exceed the authority of the County Court, and what state taxes, if any, will the County Court be required to pay on such gasoline as will be used by the Sheriff and his Deputies?"

Sections 57.430 and 57.440, RSMo 1959, direct the method by which a third class county sheriff and his deputies shall be paid their traveling expenses.

Section 57.430 reads as follows:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed seven cents per mile, and actual expenses not to exceed seven cents per mile for each mile traveled, the maximum amount allowable to be seventy-five dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote.

"At the end of each month, the sheriff and each deputy shall file with the county court

Honorable Darold W. Jenkins

an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

Section 57.440 reads as follows:

"Claims for reimbursement for travel shall be submitted to the county court monthly and paid at the end of the month by warrant drawn on the county treasury by the county court."

A reading of the two above-cited statutes reveals that there is no specific authorization to reimburse the sheriff and deputies for their automobile expenses in the manner which your letter proposes; that is, for the county court to allow the sheriff and each deputy \$75.00 worth of the county's gasoline.

The question that you present is not unlike the one decided in *Maxwell v. Andrew County*, 347 Mo. 156, 146 S.W. 2d 621. The court stated, at l.c. 625:

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute.

* * * * *

"The statutes regulating the compensation of sheriffs expressly provide for the payment of mileage in certain cases. For example, such provision is made when the

Honorable Darold W. Jenkins

officer is serving subpoenas or writs or transporting a prisoner to the penitentiary. The specification in the statute of instances when mileage is to be paid and money lawfully be received by the sheriff constitutes an implied prohibition upon its collection in other instances. * * * (Emphasis supplied)

In *Nodaway County v. Kidder*, 344 Mo. 795, 129 S.W. 2d 857, the court, in construing the authority of a county court to pay a county officer in a manner inconsistent with the applicable statutes, declared (l.c. 860):

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *" (Emphasis supplied)

On the basis of the foregoing, it appears that the authority of the county court to allow and the authority of the sheriff and deputies to receive travel allowances is confined to that method set out in Sections 57.430 and 57.440, which is by warrants drawn upon the county treasury by the county court after verified statements of travel and expenses have been submitted by the sheriff and deputies and approved by the county court.

Parenthetically, it may be noted that Section 57.430 gives the county court the authority to pay the actual and necessary travel allowances not to exceed seven cents per mile, with the maximum allowable to be Seventy-Five Dollars per month. However, this statute does not give the court the authority to pay the maximum rate of seven cents per mile unless such maximum shall actually have been incurred; nor does the statute give the court the authority to pay the maximum total of Seventy-Five Dollars per month unless the sheriff or deputy claiming that maximum has traveled the required number of miles computed at his actual expenses per mile, not to exceed seven cents per mile, while carrying out the duties specified by Section 57.430.

Honorable Darold W. Jenkins

Since the proposed plan to pay the sheriff's and deputies' travel allowances in county gasoline instead of by the method prescribed by law is beyond the scope of authority of the county court, your inquiry concerning the taxes on the gasoline need not be answered.

CONCLUSION

It is the opinion of this department that the county court is not authorized to pay the sheriff's and deputies' travel allowances by giving them the equivalent of \$75.00 per month in gasoline instead of paying such allowances by the means directed by Sections 57.430 and 57.440, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gilbert D. Stephenson.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GDS:ms

POLITICAL COMMITTEE:
PARTY COMMITTEE:

Officers chosen by county committee
under Section 120.800 RSMo., 1959,
are elected for an indeterminate
term.

April 12, 1961



Honorable John R. Johnson
Missouri Senate
State Capitol Building
Jefferson City, Missouri

Dear Senator Johnson:

In your letter of February 21, 1961, you made the following request:

"I would appreciate receiving your official opinion regarding Section 120.800, R.S.Mo. 1959."

"I would like to know whether or not the County Chairman of a political party committee is elected for a specific term of office."

Section 120.800 RSMo. 1959 provides:

The county committee, or city committee, as the case may be, shall be composed of the committeemen and committeewomen elected in the several townships, or voting districts, at the August primary next preceding and shall meet at the county seat of the several counties of this state, and at such place in any city not within a county as the chairman of the then existing city committee may designate, on the third Tuesday in August of the year in which the primary election is held, and organize by the election of one of its members as chairman and one of its members as vice-chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the committee. The county chairman and vice-chairman so elected shall by virtue thereof become members of the party congressional, senatorial, and judicial committees of the district of which their county is a part."

A question similar to the one you submit was before the Supreme Court in *State ex rel Henry W. Kiel, et al. v. George W. Reichmann, et al*, 239, Mo. 81, 142 S.W. 304. In that case the several members of the party committee, having received their certificates of election on August 2, 1910, met on August 9, 1910 and elected a chairman, vice-chairman, secretary, treasurer, and sergeant-at-arms. These officers continued to hold their office until their offices were declared vacant by a majority of the committee and new officers were elected. The Court had under consideration Section 5880 R.S.Mo. 1909 which provided for the election of Committeemen at the August primary. Said section further provided:

"* * * Each county committee, composed of the various ward and township committeemen, shall meet at the county seat of such county on the first Tuesday after the said August primary, and organize by the election of one of its members as chairman, and by electing a secretary and treasurer, who need not be members of said committee, and the chairman so elected shall, by virtue thereof, become a member of the party congressional senatorial and judicial committee, of the district of which his county is a part, * * *".

In construing Section 5880, supra, the Court said, l.c. 94-95:

"Nor in our judgment does the statute contemplate a two year undeterminable tenure by the officers of the committee. Section 5880, Revised Statutes 1909, says that the committee shall elect officers, on the Tuesday after the August Primary. It fixes no term nor tenure. * *"

"* * The law making power had no desire to strip party committees of all the power formerly possessed by them, but only of such powers as would best subserve the public interest in honest primaries and elections. Such political committee ought to have the right to change its officers. The political work of such committee might be stifled by unruly officials. The statute never contemplated that if the committee concluded that a mistake from a party standpoint had been made in the selection of a certain officer, such mistake could not be reached by the proper action of the committee. In other words, these laws were not intended to prevent party committees from doing active and efficient service for their respective parties, and to that end have officers thoroughly in harmony with the majority of such committees, but such laws were enacted solely for the purpose of securing, through the good offices

Honorable John R. Johnson

of the State, absolute fairness and honesty in the selection of committeemen and in the action of the committee in so far as it came in contact with the State's election officials and machinery. * * *

The court further held that a majority of the duly constituted committee members can transact business of the committee and that their action in removing the officers previously elected and electing other officers are within their authority.

Section 120.800, supra, in so far as it provides for the election of officers is in substantially the same language as Section 5880, supra, in that regard and we believe the decision of State ex rel Kiel, et al v. Reichmann, supra, would be followed and is controlling on a construction of Section 120.800, supra.

CONCLUSION

It is the opinion of this office that officers elected as provided in Section 120.800, R.S.Mo. 1959 are not elected for a specific term of office but may be replaced by a majority of the committee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

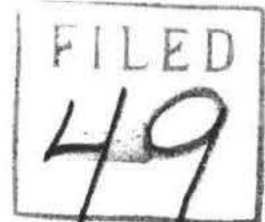
THOMAS F. EAGLETON
Attorney General

MM:bv

AGRICULTURE:
ADMINISTRATIVE RULES:
FERTILIZER:

Director of Missouri Agricultural experiment station at Columbia, Missouri, having the authority to promulgate regulations under the Missouri Fertilizer Law, Sections 266.291 to 266.351, RSMo 1959, may not, in the exercise of such power add to the labeling requirements of Sec. 266.321, RSMo 1959, because such action would be adding to the Fertilizer law and adding to its scope.

April 13, 1961



Dean Elmer R. Kiehl
College of Agriculture
University of Missouri
Columbia, Missouri

Dear Dean Kiehl:

This is in reply to your letter dated March 6, 1961, in which you state:

"The Missouri Fertilizer Law (Chapter 266.290-266.350 RSMo) is designed to insure that materials sold contain the quantities of ingredients guaranteed. At present the law is only concerned with nitrogen, phosphorus and potassium. Other elements, such as magnesium, sulfur, boron, zinc, copper, manganese, molybdenum, and possibly iron, may be needed on some Missouri soils, and are being included in some fertilizers by many manufacturers. We have been approached by control officials in another state to adopt uniform requirements for minimum content, guarantee, and labeling, when these additional elements are included. This is desirable since manufacturers may sell the production of one manufacturing plant in a number of states. Also, minimum content requirements would eliminate some unscrupulous promoters.

"I would appreciate your interpretation of the law as to whether it is possible to require a guarantee of these additional elements by adopting regulations as provided by 266.340, '(2) To adopt, after public hearing, such reasonable rules and regulations necessary to secure the efficient enforcement of sections 266.290 to 266.350)', or whether

a change in the law will be necessary?

"Paragraph 3, section 266.290 - Definitions- is quite broad. '(3) "Fertilizer" means any substance containing nitrogen, phosphorus, potassium, or any other element or compound recognized as essential or used for promoting plant growth, or altering plant composition, which is sold or used primarily for its plant nutrient content, the consumer's purchase price of which exceeds ten dollars per ton, and which is to be sold or offered for sale for consumption or use in this state.'

"However, the present guarantee requirement as provided in item 3, paragraph 1 of section 266.320 states:

'(3) The guaranteed chemical composition of the fertilizer, expressed in the following terms:

- (a) Percent of total nitrogen
- (b) Percent of available phosphoric acid
- (c) Percent of soluble potash.

Unacidulated mineral phosphatic materials and basic slag shall be guaranteed as to both total and available phosphoric acid, and the degree of fineness as expressed in percentage passing through standard mesh sieves. In the case of bone, tankage, and other natural organic phosphate materials, only total phosphoric acid must be guaranteed.'

"The definition of a fertilizer is quite general, but the information required on containers is specific. Should it become desirable, or necessary to require a guarantee for additional elements, does the Director have the authority under the present law to require this additional information, or will it be necessary to change the law? I would appreciate your interpretation.

"If it would be helpful, I will have someone from the Agricultural Experiment Station who is familiar with fertilizer industry meet with your representative to supply additional information.

"I am enclosing a copy of the revised Fertilizer Law as compiled by the Agricultural Experiment Station. The last page contains some of the regulations that have been adopted after public hearings."

Administrative personnel and agencies may be authorized by a Legislature to promulgate regulations designed to aid in the disposition of their duties and to effectuate the purpose of the statute under which they operate. This principle was expressed by the Missouri Supreme Court in the case of Ex Parte Williams, 139 SW 2d 485. In its opinion the court stated on page 491 as follows:

"'A legislative body cannot delegate its authority, but alone must exercise its legislative functions. 12 C.J. 839; 6 R.C.L. 175. It may empower certain officers, boards, and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms and may define certain areas within which certain regulations may be imposed, and it may empower a board or a council to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area.'"

The Legislature therefore has validly delegated to you, by Section 266.341 (2) RSMo 1959, the power to adopt reasonable rules and regulations necessary to secure the efficient enforcement of the Missouri Fertilizer Law. (Section 266.291-266.351, RSMo 1959).

There are however, limits on the power to promulgate regulations. We first direct attention to Section 94, page 414 C.J.S. Vol. 73, Public Adm. Bodies & Procedure.

"A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations amend, alter, enlarge, or limit the terms of a legislative enactment."

Dean Elmer R. Kiehl

Am. Jur. Vol. 42: P. 358 Public Admin. Law, Section 53:

"Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a regulation which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the law makers intent in other statutes."

It can be seen by these authorities that while administrative agencies and personnel can adopt rules aiding in the administration or enforcement of a legislative act, they cannot enlarge, limit, or alter the statute under which they operate.

Your problem is that you want to enlarge the scope of Section 266.321-1 (3) RSMo 1959, by adding to the materials there required to have their guaranteed chemical composition placed on fertilizer labels, other materials such as magnesium, sulfur, boron, zinc. The courts have specifically limited administrative agencies and personnel in any attempt to add to statutory provisions something for which the Legislature has not provided.

The Supreme Court of the United States stated the rule in the case of Campbell v. Galeno Chemical Co., 281 US 599, 610, 74 Law Ed. 1063, 1069 (Sup. Ct. U.S. 1929). The Volstead Act had entrusted to the Treasury Department the task of issuing permits for the purchase, manufacture and sale of alcohol for certain purposes. The act also provided a procedure by which the permits could be revoked by the department. The Treasury attempted to promulgate a regulation which revoked all existing permits and set up new added requirements for the reissuance. The court held the regulation invalid. In his opinion for the court, Mr. Justice Brandeis stated:

"The limits of the power to issue regulations are well settled. Int. R. Co. v. Davidson, 257 U.S. 506, 514, 66 Law Ed. 341, 343, 42 Sup. Ct. Rep. 179. They may not extend a statute or modify its provisions."

The lower Federal Courts have also expressed this principle. In United States v. Powell, 95 Federal 2nd 752 (CCA4, 1938) the Circuit Court of Appeals, for the 4th circuit struck down a Treasury Department regulation placing a tax on the issuance of receiver's certificates. Congress had imposed a tax on certificates and debentures issued by corporations, but had said nothing about things of that nature issued by individuals such as receivers. The Court stated at Page 754:

"While it is true that great weight is accorded administrative application and construction of statutory provisions, * * * it is equally true that

Dean Elmer R. Kiehl

where the provisions of an act are plain and unambiguous, the governmental department administering the statute has no power to extend or amend it by regulations. The power of an administrative officer to prescribe regulations does not carry with it the power to make law."

State Courts have expressed the rule also. In Whitcomb Hotel v. California Employment Commission, 24 Cal. 2d 753, 151, P. 2d. 233, 236 (1944), the California Employment Commission attempted to add a provision to the Unemployment Compensation Law, by limiting the period that benefits would be denied people who did not seek work. In invalidating this regulation the Supreme Court of California said:

"An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment."

CONCLUSION

It is the opinion of this department that in issuing regulations regarding the inclusion on fertilizer labels of the guaranteed chemical composition of magnesium, sulphur, boron and zinc and other elements mentioned in your letter, you would be adding to the provisions of the Fertilizer Law and extending its scope. Such action on your part would, under the preceding authorities, be invalid. In order to alleviate the problem which exists as to these additional elements you should attempt to have the Legislature amend Section 266.321, RSMo 1959 so as to include them.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Ben Ely, Jr.

Yours very truly,

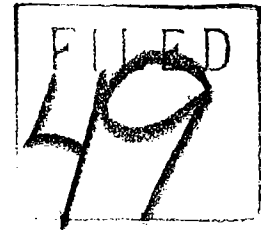
THOMAS F. EAGLETON
Attorney General

BE;ms

AIRPORTS:
CITIES OF THIRD CLASS:
CITIES OF THIRD CLASS WITH
CITY MANAGER FORM OF GOVERNMENT:
CITY MANAGER:
CITY COUNCIL:

The city council of a city of
the third class with city
manager form of government
has authority to create an
airport board to maintain
and operate a municipal airport.

November 6, 1961



Honorable Herman G. Kidd
State Representative
Randolph County
Jacksonville, Missouri

Dear Mr. Kidd:

This will acknowledge your request for an opinion upon
the following question:

"Does a city council, of a city of the
third class with city manager form of
government, have the authority to create
an airport board to operate a municipal
airport?"

Section 305.170, RSMo 1959, provides in part, as follows:

"The local legislative body of any city
. . . is hereby authorized to acquire,
by purchase or gift, establish, construct,
own, control, lease, equip, improve, main-
tain, operate and regulate . . . airports
or landing fields for the use of airplanes
and other aircraft . . ."

Section 305.210, RSMo 1959, provides in part:

"The local legislative body of a city . . .
which has established an airport or a land-
ing field and acquired, leased, or set
apart real property for such purpose may
construct, . . . maintain, and operate the
same, or may vest jurisdiction for the con-
struction, improvement, equipment, mainte-
nance, and operation thereof, in any suitable
officer, board or body of such city, . . ."

or may by franchise or contract authorize others, in whole or in part, to construct, equip, maintain, and operate the same The local legislative body of a city may adopt regulations and establish fees or charges for the use of such airport or landing field."

Section 305.220, RSMo 1959, provides that the local authorities of the city to which the foregoing sections are applicable, having power to appropriate money therein, may annually appropriate a sum sufficient to carry out the provisions of said sections.

The foregoing statute enacted in 1929, applicable generally to all cities, contains no exceptions in its grant of express authority to the legislative body of a city which has established an airport to vest jurisdiction for the operation and maintenance thereof in any suitable officer, board or body of such city. The discretion to determine which officer, board or body is suitable is left to the local legislative body. Hence, if such body determined that an airport board was suitable for the purpose, the provisions of Section 305.210 would authorize the local legislative body of any city to create such a board and confer jurisdiction upon it over the maintenance and operation of the airport. An opinion of this office, dated January 29, 1946, to Mr. Hugh Denney, Director of the Department of Resources and Development, so held.

The specific question here presented is whether the fact that a city of the third class has a city manager form of government operates to foreclose the power of the legislative body to create such an airport board and to vest jurisdiction in said board for the purpose of maintaining and operating the airport. A careful study of the statutes applicable to cities of the third class generally as well as those applicable specially to cities of the third class having a city manager form of government fails to disclose any legislative intention to exclude cities of the third class with city manager form of government from the general provisions of Section 305.210 applicable to all other cities.

Sections 78.430 to 78.640, RSMo 1959, enacted in 1921, contain the provisions specially applicable to the city manager form of government of cities of the third class. Section 78.440 provides in part, "All laws governing any city under its former organization and not inconsistent with the provisions of Sections 78.430 and 78.460 shall apply to and govern such city after it adopts" the city manager form of government.

Section 78.460 provides for a council consisting of five members. Said section provides in part as follows:

"The terms of office of the mayor and councilmen or aldermen in such city, in office at the beginning of the terms of office of the council first elected under the provisions of Sections 78.430 to 78.640, including all boards and commissions, shall cease and determine and the terms of office of all other city officers, whether elective or appointive, in force in such city except as herein provided shall cease and determine as soon as the council shall by resolution declare; provided, however, the council may continue the board of public works, and the library, hospital and park boards for such time or times after organizing under sections 78.430 to 78.640, as the interests of the city in its judgment may require."

You have informed us that it is the above-quoted provisions which are relied on by those who believe that cities of the third class with city manager form of government may not create an airport board, the contention being that such cities have no authority or power to create any boards other than those specifically mentioned in Section 78.460. We do not believe that the statute is subject to such construction. In our view, the "cease and determine" reference to "all boards and commissions" pertains to the terms of office of those in office when the new form of government became effective, and not to the boards themselves. Such language is not apt if the intent were to prohibit the creation of new boards and commissions.

It is to be noted that the provision for "continuing" the board of public works and the library, hospital and park boards is permissive and not phrased in such a manner as to exclude the creation of any other board or commission than those specifically enumerated. It is further to be noted that the reference to such boards which are specifically enumerated states that the council may "continue" such boards, language which would imply the continuance of an existing board rather than the creation of a new one of such kind. The obvious intent of this statute was to permit the new council to continue both the existence and terms of membership of existing boards of public works, and of library, hospital and park boards, rather than to preclude the creation of such board or commission as the council thereafter might deem necessary or desirable as being in the interest of the city.

Paragraph 2 of Section 78.570, RSMo 1959, makes it the duty of the council to pass all ordinances "conducive to the welfare

of the city", and expressly authorizes the council to provide for all offices and positions in addition to those therein specified "which may become necessary for the proper carrying on of the work of the city." Thus, Section 78.570 leaves it to the discretion of the council to determine what offices and positions shall be created for the proper carrying on of the work of the city.

Section 78.570, RSMo 1959, provides in paragraph 1 that:

"Except as herein otherwise provided the council of any city organizing under sections 78.430 to 78.640, shall have all of the powers now or hereafter given to the council or to the mayor and council jointly, under the law by which such city adopting said sections was governed under its former organization; and shall have such power over and control of the administration of the city government as is provided in said sections."

Chapter 77, which relates to cities of the third class generally, contains no legislative expression which would exclude the applicability of the general airport law to such cities, and therefore Section 305.210 gives to the councils of such cities the power to create an airport board.

We find no provision in any statute which would bar the council of a city of the third class having the city manager form of government from creating a new board of any kind which it deems necessary or suitable. On the contrary, the council is expressly granted power to create all offices, which would include any board or commission, it deems desirable or necessary for the proper carrying on of the work of the city. Absent an express prohibition against the creation of an airport board by the council of such a city, it is our view, therefore, that Section 305.210 is applicable, and that under the provisions thereof the council of a city of the third class with city manager form of government is authorized to create an airport board having jurisdiction over the operation and maintenance of the municipal airport.

Conclusion

It is the opinion of this office that the city council of a city of the third class with city manager form of government has authority to create an airport board to maintain and operate a municipal airport.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

July 7, 1961

Honorable Paul Knudsen
Prosecuting Attorney
Caldwell County
Kingston, Missouri



Dear Mr. Knudsen:

We are in receipt of your recent request for an opinion of this office in reference to the following questions:

"1. Is the 'Notice of Letters of Administration', as provided in Section 473.033 a legal publication as provided in Chapter 493 of the Revised Statutes of Missouri, 1959, and is the 'Notice of Final Settlement', a legal publication as provided in Section 493.030, Revised Statutes of Missouri, 1959?

"2. If the answer to #1 is yes, then are we right in assuming that a newspaper in a county of the third class, is limited to a charge of 3 cents per word for each insertion, or in the alternative of 75 cents per square inch, or major fraction thereof for each insertion, as provided in Section 493.030, Revised Statutes of Missouri, 1959?

"3. If the answer to #1 is no, then is there any provision stipulated for publication charges or rates in reference to probate publications, or does the editor have the right to charge whatever he sees fit?"

Section 493.030 RSMo 1959, by its terms is limited to publications "for the state, or for any public officer on account of or in the name of the state, or for any county or for any public officer on account of or in the name of any county."

In our opinion, neither the "Notice of Letters of Administration" nor the "Notice of Final Settlement" comes within

Honorable Paul Knudsen

the purview of the foregoing statute. Even though the notice of letters must be given by the clerk of the court, such notice is not given on account of or in the name of either the state or the county.

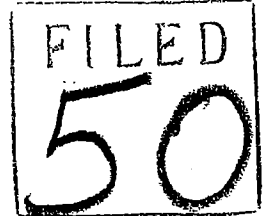
It should be noted that prior to its amendment in 1955, Section 493.030 contained an express provision to the effect that "when any. . . notice shall be required by law to be published in any newspaper, the rates herein specified shall prevail." The deletion of said clause clearly evidences the legislative intention to eliminate the application of the statutory rates to any notices other than those expressly set forth. It is our opinion that in counties of the third class, there is no statutory provision prescribing or limiting publication charges or rates in reference to probate publications.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:aa

December 18, 1961



Mr. Paul Knudsen
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Mr. Knudsen:

We are in receipt of your letter of December 11, 1961, in which you request our opinion as to the proper procedure to determine the legality of a tax levied by Breckenridge Township in your county for the erection of a public toilet.

Also we understand your problem, the Chicago, Rock Island and Pacific Railroad Company has refused to pay a part of their tax which represents an amount due for the toilet, due to the fact that the measure did not carry by a two-thirds majority.

We direct your attention to Sections 151.220-151.250, RSMo 1959, which prescribe the procedure for the collection of unpaid taxes by railroads. We believe that this procedure is applicable here and is the procedure by which the validity of this tax should be determined.

We believe that the other questions mentioned in your letter, regarding the proper action to be taken if the tax is held invalid, should be resolved when, and if, the tax is so held.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

BE:ms

COUNTY HOSPITAL: A regularly licensed and qualified physician
PHYSICIAN: who has been a member of the staff of the
Callaway County Hospital and who has voluntarily resigned from said staff, may nevertheless continue to practice in the hospital
PATIENT IN
COUNTY HOSPITAL: when acting for his patient in the hospital.

July 19, 1961



Honorable T. E. Lauer
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

We are in receipt of your letter requesting an opinion from this office, which request is as follows:

"Mr. Joseph Perou, Administrator of the Callaway County Hospital, has requested that I furnish him with an answer to the following question:

May a licensed physician who has been a member of the staff of a county hospital continue to practice in the hospital after his voluntary resignation from the hospital staff?"

Further inquiry has indicated that the Callaway County Hospital has, among others, the following requirements:

"A physician must be a member of the staff in order to have the privilege of practicing in the county hospital. A physician, prior to becoming a member of the staff, must be accepted as a member of the county medical society. Appointment of new members of the staff is made only if recommended by the present staff."

As an introduction to the general law on this subject, the following quotation indicates the general law in most states:

Honorable T. E. Lauer

26 Am. Jur., Hospitals and Asylums, Sec. 9.
Regulations as to Use or Practice by Physicians and Surgeons--

"It is generally agreed that the managing authorities of a hospital, under the power to adopt reasonable rules and regulations for the government and operation thereof, may, in the absence of any statutory restriction, prescribe the qualifications of physicians or surgeons for admission to practice therein. This rule has been held or declared applicable in the case of both public and private institutions. And the decisions are generally to the effect that the managing authorities of a hospital, in the absence of any inhibiting statute or bylaw, may adopt and enforce reasonable regulations in respect of the qualifications of practitioners to engage in particular kinds of practice or to perform particular kinds of operations, and also in respect of the conditions under which operations or particular kinds of operations or other services may be performed. Rules and regulations which operate to exclude practitioners of various particular schools or systems of medicine or treatment, such as osteopathy and chiropractic, have been upheld, as against various objections, in the case of both public and private institutions. The failure or refusal of a practitioner to comply with a rule or regulation of a hospital may be a sufficient ground for the revocation or suspension of the privilege of practicing therein.

"It seems to be the practically unanimous opinion that private hospitals have the right to exclude licensed physicians from the use of the hospital, and that such exclusion rests within the sound discretion of the managing authorities. This is not, however, the rule applied to public hospitals, since a regularly licensed physician and surgeon has a right to practice in the public hospitals of the state so long as he stays within the law and conforms to all reasonable rules and regulations of the

institutions. It has, however, been stated that a physician or surgeon, although duly licensed under general laws, has no constitutional or statutory right, or right per se to practice his profession in a public hospital. And it is generally recognized that a practitioner cannot complain of his exclusion from a public hospital by the operation of reasonable rules and regulations adopted for the government thereof. But one cannot be deprived of the right or privilege to practice in a public hospital by rules, regulations, or acts of its governing authorities which are unreasonable, arbitrary, capricious, or discriminatory. And in some jurisdictions, the rule is that a regularly licensed physician or surgeon has a right to practice in the public hospitals of the state so long as he stays within the law, and conforms to all reasonable rules and regulations of the institutions. Neither a city nor the authorities of a public hospital can prescribe rules or regulations for the conduct of physicians and surgeons practicing in such hospital that contravene or conflict with state laws, and a regularly licensed physician and surgeon, although soliciting practice from other physicians and offering to divide his fees with them, cannot be debarred therefor from practice in the public hospitals of the state, where he has not been guilty of unprofessional or dishonorable conduct as defined by the statutes for the licensing and conduct of physicians and has not divided any fee with a physician who brought a patient to him without the consent of the patient." (Emphasis supplied.)

In 24 ALR 2d 851 the following rules are stated:

"It has been stated that a physician or surgeon, although duly licensed under general laws, has no constitutional or statutory right, or right per se, to practice his profession in a public hospital.

"And it is generally recognized that a practitioner cannot complain of his exclusion from a public hospital by the operation

Honorable T. E. Lauer

of reasonable rules and regulations adopted for the government thereof.

"But one cannot be deprived of the right or privilege to practice in a public hospital by rules, regulations, or acts of its governing authorities which are unreasonable, arbitrary, capricious, or discriminatory."

In a recent article in the January, 1960, issue of Cleveland-Marshall Law Review, it is stated:

"Licensing of a physician by a state gives him no absolute right to membership on the medical staff of a public hospital. . . ."

And, in the case of *Jacobs v. Martin*, 90 A. 2d 151 (N.J.), the court said:

"While the issuance of a license to practice medicine and surgery by the State Board of Examiners evidences the qualifications and the right of the holder thereof to practice within the State, it does not give him the right per se to practice in a municipal institution."

In the case of *Hayman v. Galveston*, 273 US 414, 47 S. Ct. 364, the United States Supreme Court said:

" * * * it cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private practice of medicine."

The foregoing constitutes the general law announced in most states, that is, the managing authority of a public hospital has the power and authority to operate, govern and manage the institution and may adopt reasonable rules and regulations to carry out that purpose, provided such rules and regulations are not in conflict with state statutes or state law.

We must then turn to an examination of the applicable Missouri statutes. The following statutes appear to affect the matter:

Honorable T. E. Lauer

Section 205.190, Subsection 4, RSMo 1959.

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

(Emphasis supplied.)

Section 205.270, RSMo 1959.

"Every hospital established under sections 205.160 to 205.340 shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but every such inhabitant or person who is not a pauper shall pay to such board of hospital trustees or such officer as it shall designate for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendants, according to the rules and regulations prescribed by said board, such hospital always being subject to such reasonable rules and regulations as said board may adopt in order to render the use of said hospital of the greatest benefit to the greatest number; and said board may exclude from the use of such hospital any and all inhabitants and persons who shall wilfully violate such rules and regulations. And said board may extend the privileges and use of

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such hospital to persons residing outside of such county, upon such terms and conditions as said board may from time to time by its rules and regulations prescribe."
(Emphasis supplied.)

Section 205.280, RSMo 1959.

"When such hospital is established the physician, nurses, attendants, the persons sick therein and all persons approaching or coming within the limits of same, and all furniture and other articles used or brought there shall be subject to such rules and regulations as said board may prescribe." (Emphasis supplied.)

Section 205.300, RSMo 1959.

"1. In the management of such public hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Missouri, and all such legal practitioners shall have equal privileges in treating patients in said hospital.

"2. The patient shall have the absolute right to employ at his or her own expense his or her own physician, and when acting for any patient in such hospital the physician employed by such patient shall have exclusive charge of the care and treatment of such patient, and nurses therein shall as to such patient be subject to the directions of such physician; subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of sections 205.160 to 205.340." (Emphasis supplied.)

It is therefore apparent that, under the provisions of Section 205.190, supra, the board of hospital trustees, not the staff, has the power and authority generally to manage, operate and control the hospital and its affairs and, further, may make appropriate rules and regulations. The power to make appropriate rules and regulations is reinforced by the provisions of Section 205.270, RSMo 1959.

The broad power granted to the board is, however, somewhat circumscribed by the provisions of Section 205.300, supra. The

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extent of this circumscription or limitation appears to be the crux of the problem here presented. The only case construing Section 205.300 is *Stribbling v. Jolley*, 253 SW2d 519 (St. Louis Court of Appeals - 1952). In that case, it appeared that the board of trustees of a county hospital had established a rule excluding osteopaths from practicing in the county hospital. The court held this rule to be illegal under Section 205.300, stating in part at page 524 of its opinion:

"From this it seems obvious that the Legislature, in prohibiting the boards of county hospitals from discriminating against any school of medicine, used language that included osteopathic physicians.

"The matter need not, however, rest upon that alone, for it will be noted that there is a further provision in the second paragraph of the statute providing that the patient in the hospital has the absolute right to the 'physician' of his choice. There is no qualification as to the school of medicine to which the physician may belong and the Legislature has considered and called doctors of osteopathy 'physicians' in the act regulating their practice. * * *"

The *Stribbling* case, of course, does not determine the law under the facts as presently presented. However, this case does more clearly enunciate the meaning of Section 205.300. Section 205.300 does two things:

(1) It prohibits the board or other management of a public hospital from discriminating against any legally recognized practitioner in that hospital. In other words, it authorizes any person to practice who is by law recognized to practice in a public hospital on the same basis that every other practitioner is authorized in that hospital;

(2) It vouchsafes to the patient the absolute right to employ his own physician to attend him in such a public hospital and puts that physician in exclusive charge of his care, subject only to reasonable rules and regulations established by the board.

This statute, by prohibiting discrimination among physicians and by granting to patients the absolute right to select their own physician, has undoubtedly placed a greater limitation upon the rules and regulations that may be promulgated by the board of

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trustees than is true in most other states. The most analogous situation to the instant question is found in Indiana. That state has a statute similar to ours here in Missouri, i.e., "the patient shall have the absolute right to employ, at his or her own expense, his or her own physician . . ." A county hospital in Indiana set up various requirements before a physician could practice in the hospital including requirements similar to those of the instant Callaway County Hospital which require that the physician belong to the local medical society and place the power to appoint staff members in the hands of the present staff. The Supreme Court of Indiana held that such rules were invalid and in conflict with the "absolute right" statute as quoted before. See Hamilton County Hospital v. Andrews, 84 NE2d 469.

In Rutgers Law Review, Winter 1961, at page 341, referring to the case of Ware v. Benedikt, 255 Ark. 185, 280 SW2d 234, the Law Review article says:

"The plaintiff was a licensed physician who was excluded without reasons by the local medical society. A hospital bylaw required membership in the society as a condition precedent to hospital use. Following the institution of suit, the hospital bylaw was amended to require only the 'approval' of the county medical society. The court held the bylaw unreasonable in either form. The 'membership' requirement was regarded as an invalid delegation to the medical society of the power to determine who may use the hospital. It was noted that membership in the society is entirely beyond the control of the plaintiff. Nor did the 'approval' rule bear any relation to the public safety and welfare since the society might withhold its approval for a valid reason, an invalid reason, or no reason at all."

Thus, under Section 205.300 we make the following observations:

(1) The present rule of the Callaway County Hospital is invalid. The board of trustees of a county hospital cannot require membership in a private medical society as a prerequisite to practice in the hospital. Further, the board of trustees cannot delegate to the present staff the right to determine who shall or shall not practice in the hospital.

(2) A county hospital, through its board of trustees, has the right to establish reasonable and nondiscriminatory rules and

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regulations regarding the practice of medicine within the hospital. Such rules can pertain to the practice of medicine within the hospital, the training, background and qualifications of the physician, his physical disabilities, etc. If a physician satisfies all the requirements of such reasonable and nondiscriminatory rules and thereby obtains the label "staff member," all well and good. Obviously, he can practice in the hospital. Likewise, if a physician satisfies all the requirements of such reasonable and nondiscriminatory rules, but for some reason does not receive or does not desire the label of "staff member," he still can practice in the hospital. There is no magic in the words "staff member."

Admission to the facilities of a public hospital depends on but two things: (a) The absolute right of the patient to select his doctor and (b) that the doctor selected be qualified to practice by and under the laws of Missouri and the reasonable rules of the hospital.

Rules concerning the right of a physician to practice in a public hospital which are not related to the physical, technical and medical competence of the physician are unreasonable.

(3) We must emphasize that in Missouri a patient in a public hospital is given greater rights with respect to selecting his doctor and the use of the public medical facilities than is the case in other states. The patient's "absolute right" can be qualified only by reasonable rules as established by the board of trustees of the hospital.

This ruling must be considered applicable only to the facts as presented in this inquiry. The validity of other rules as established by the board of trustees of a public hospital is expressly not ruled upon as to their reasonableness.

CONCLUSION

It is therefore our conclusion that a regularly licensed and qualified physician who has been a member of the staff of the Callaway County Hospital and who has voluntarily resigned

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from said staff may nevertheless continue to practice in the hospital when acting for his patient in the hospital.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Clyde Burch.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TAXATION:
STATUTES:
CONSTRUCTION OF STATUTES:
CONSTITUTIONAL LAW.

Senate Substitute No. 2 for Senate Bill No. 78, effective October 13, 1961, has no retrospective effect and does not operate to forgive taxes which were assessed under the law in effect prior to said date.

August 11, 1961



Honorable James P. Landis,
Representative, Newton County,
605 West Hickory,
Neosho, Missouri

Dear Mr. Landis:

You have requested an opinion from this office with respect to the following:

"As you know the 71st General Assembly enacted legislation which would exempt goods in transit or in warehouse storage from property taxes. I do not know whether it was Senate Bill 78 or a House Committee substitute for a House Bill 309 which ultimately received approval by both Houses and which was signed by the Governor.

"I would appreciate your advising whether, under the terms and provisions of the statute, property taxes which may have been assessed against personalty in transit or in warehouse storage are forgiven for the current year since such taxes are not due and payable until approximately November 1, which date is subsequent to the effective date of the statute, or whether taxes levied against such personalty for the current year must nevertheless be paid."

The bill referred to in your letter which was enacted by the General Assembly and approved by the Governor is Senate Substitute No. 2 for Senate Bill No. 78, effective October 13, 1961. This bill enacts a new section known as Section 137.093, as follows:

"Tangible personal property moving through the state or consigned to a warehouse in this state from a point outside the state, in transit to a final destination outside the state shall, for purposes of taxation,

Honorable James P. Landis

acquire no situs in the state. The owner shall if required, in order to obtain a determination that any property has not acquired a situs in the state, submit to the appropriate assessing officer documentary proof of the in transit character and the final destination of the property."

Section 137.075, RSMo 1959, provides that every person holding or owning tangible personal property on the first day of January shall be liable for taxes thereon during the same calendar year. Section 137.080, RSMo 1959, provides for the assessment of tangible personal property annually as of the first day of January.

Section 137.115, RSMo 1959, provides that the assessor shall between the first day of January and the first day of June annually, make a list of all tangible personal property taxable in his county, town or district. Section 137.245, RSMo 1959, provides that the assessor shall make out and return to the County Court on or before the 31st day of May the assessor's book, which among other things, contains the assessed valuation of tangible personal property assessed to each individual. Other provisions of Chapter 137 provide for subsequent procedure with respect to the assessment of taxes.

It clearly appears from our statutes that the taxable situs of tangible personal property is to be determined as of January 1 of each year, and that the assessment of taxes is based upon such situs as of January 1st. Hence, if under the law in effect on January 1 of a particular year tangible personal property has a situs in this state for the purpose of taxation, it follows that the owner of said property is liable for taxes with respect thereto for the year in question.

It appears from your letter that the assessment procedures have already been completed with respect to the property in question, so that the question on which you request an opinion is whether the taxes which will become payable with respect to such assessments must be paid or whether said taxes will be forgiven as of October 13, 1961 by the newly enacted legislation.

The language of the bill makes it clear that it refers only to the initial assessment of personal property. It is to be noted that under the terms thereof, if the owner of such property desires to obtain a determination that his property has not acquired a situs in this state, he shall, if required, submit the necessary proof to the appropriate assessing officer. In the situation presented by your question, the assessing officer

Honorable James P. Landis

has no further duty to perform, since he has already completed the assessment as required by the statute now in effect. The title to the bill emphasizes the fact that it pertains only to the assessment of property rather than to the payment or forgiveness of taxes which have already been assessed. We quote the title:

"An Act to amend Chapter 137, RSMo 1959, relating to the assessment of property taxes by inserting between sections 137.090 and 137.095 thereof a new section relating to the same subject to be known as Section 137.093." (Emphasis supplied)

There is no language, either in the title to the Act or in the bill itself which evidences a legislative intent to forgive taxes which have already been assessed and which will become payable in due course during the calendar year.

Moreover, even if the Act were broad enough to relate to the payment of taxes, instead of being limited to the assessment thereof, our conclusion would be unchanged. There is no language in the statute which may be read as being retrospective. It relates solely to conditions in the future, subsequent to the effective date of the law, so that the taxable situs of the property is fixed as of January 1 of the following year and each January 1st thereafter (or any other date which the law may specify as the date for determining liability for taxes).

The law is well settled that in the construction of statutes "they must be held to operate prospectively only, unless the intent is clearly expressed that they shall act retrospectively, or the language of the statute admits of no other construction." To this effect are *Lucas v. Murphy*, 348 Mo. 1078, 156 S.W. 2d 686, 1. c. 690 (just quoted) and *Clark Estate Co. v. Gentry*, 240 S. W. 2d 124, 1. c. 129. In the latter case the court held as follows:

"The rule is that, in the absence of clear legislative intent to the contrary, the effect of statutes is prospective only."

In *State ex rel. Bauer v. Edwards*, 136 Mo. 360, 38 S. W. 73, involving a statute requiring an owner to list his property as of June 1st of the year of assessment and that the value be placed upon it as of that day, the Court held that property was required to be assessed under the law then in effect rather than under a revised law which did not take effect until November 1 of such year, even though the assessor had not completed his work of assessment as of the latter date.

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Even if it were possible to construe the statute to operate retrospectively, such construction should not be given, for the reason that a statute attempting to forgive a taxpayer's liability would be violative of Section 39(5) of Article III of the Constitution of 1945 which provides that the General Assembly shall have no power

"To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation; * * *"

In *Graham Paper Company v. Gehner*, 332 Mo. 155, 59 S. W. 2d 49, the Supreme Court en banc construed a very similar provision of the Constitution of 1875 (Section 51, Article IV) and held that a liability for a tax (income in that case) though not due or payable, was an obligation or liability which the legislature could not validly release or extinguish.

We therefore are of the opinion that any statutory change with respect to the taxable situs of the property involved in your question has no retrospective effect, and that this bill does not operate to void taxes which were validly assessed under the law presently in effect.

CONCLUSION

It is the opinion of this office that Senate Substitute No. 2 for Senate Bill No. 78, effective October 13, 1961, has no retrospective effect, that it does not operate to forgive taxes assessed with respect to tangible personal property in transit or in warehouse storage for the year 1961, and that such taxes must be paid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
ATTORNEY GENERAL

MAGISTRATES: Magistrate may issue execution directed to sheriff
of another county for purpose of making levy or
EXECUTIONS: garnisheeing of judgment debtor.

October 4, 1961

Honorable T. E. Lauer
Prosecuting Attorney
Callaway County
Fulton, Missouri



Dear Mr. Lauer:

On August 21, 1961, you wrote to this office requesting a review and reappraisal of a previously written opinion by this office. This earlier opinion was written on July 28, 1948, and was addressed to Judge Oral H. McCubbin of Lawrence County. The basic issue in the earlier opinion was "whether or not a magistrate may issue an execution from his court directed to the sheriff of another county, either for the purpose of making a levy on property of the judgment debtor, or for the purpose of serving a writ of garnishment on the employer of the judgment debtor who may be residing in another county." In the 1948 opinion we answered this question in the negative. We have withdrawn that opinion and are issuing the following in its place.

Section 517.050, RSMo 1959, states, "magistrate courts shall be courts of record". Section 517.910, RSMo 1959, is also found in the chapter entitled Magistrate Court Procedure and in relation to the magistrate courts it says, "Execution, except as otherwise herein provided, shall have the same force and effect and be proceeded upon the same as executions issued out of other courts of record; * * *". Those sections in Chapter 513 which set forth the procedure to be used in levying executions apply to magistrate courts. In Section 513.035, RSMo 1959, it specifically provides that "Executions issued upon any judgment, order or decree rendered in any court of record, may be directed to and executed in any county in this state; and executions may issue at the same time to different counties". This is substantially the same as Supreme Court Rule 76.05.

Although there is no case law on the subject, the basic theory that a magistrate court is a court of record and that executions from magistrate courts may be directed to any sheriff in the state has been expressed in Volume I, Missouri Practice, Section 1361, p. 640.

CONCLUSION

From the combined reading of the foregoing sections and

Honorable T. E. Lauer

Supreme Court Rule, it is the opinion of this department that a magistrate court may issue an execution directed to the sheriff of another county, either for the purpose of making a levy on the property of a judgment debtor or for serving a writ of garnishment in aid of execution in another county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

EGB:MM

INSURANCE: Amended Articles of Incorporation of American Standard Life Insurance Company.

January 3, 1961



Honorable C. Lawrence Leggett
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry of December 23, 1960, which was accompanied by an executed copy of amended Articles of Agreement of American Standard Life Insurance Company, together with executed copies of proceedings of directors and stockholders of such company, by which actions the American Standard Life Insurance Company, a stipulated premium plan life insurance company operating under Chapter 377 RSMo 1949, has by a majority vote of its directors or trustees elected to accept the provisions of Missouri's regular life law found at Sections 376.010 to 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 377.450 and 376.070 RSMo 1949. It is the opinion of this office that said documents are legally sufficient as to form, are in accord with the provisions of Chapter 376 RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

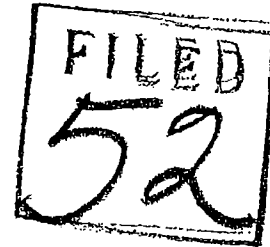
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:ms

INSURANCE: Articles of Incorporation of Missouri
General Insurance Company.



January 30, 1961

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of January 25, 1961, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Missouri General Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO:M:aa

INSURANCE: Foreign insurance company doing business in Missouri prohibited under Sec. 148.400 RSMo 1959 from deducting from premium taxes due Missouri amounts paid to satisfy taxes on real estate the company owns in Missouri, and, other than for the purpose of computing premium taxes under a foreign premium tax statute which authorizes the deduction thereof, such real estate taxes are not to be taken into consideration in determining the aggregate burdens imposed by either Missouri or the foreign state when applying the provisions of the Missouri retaliatory law.

March 14, 1961



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry posing the following specific question:

"Is a foreign insurance company licensed to do an insurance business in the state of Missouri entitled to deduct from retaliatory premium taxes those amounts paid to satisfy assessments levied against real estate held by such companies in this state in view of the provisions contained in Sections 375.450, Revised Statutes of Missouri, 1949-1953 Supplement, and 148.400, Revised Statutes of Missouri, 1949?"

The foregoing question was preceded by a statement of facts made by you disclosing that for the years 1958 and 1959 you assessed premium taxes against a California insurance company doing business in Missouri by employing Missouri's retaliatory statute, Section 375.450 RSMo 1959, but refused to allow as a claimed deduction, from premium taxes assessed, the amount of real estate taxes paid to the State of Missouri in 1958 and 1959 on real estate the California company owned in Missouri.

We first take up Missouri statutes affecting taxation of foreign insurance companies doing business in Missouri. Section 148.310 RSMo 1959 provides as follows:

"The real and tangible personal property owned by insurance companies operating in this state shall be assessed and taxed as is real and tangible personal property owned by individuals,

Honorable C. Lawrence Leggett

and the payment thereof and the distribution of the amounts received shall be in the manner provided by the general revenue laws of this state."

Section 148.310 RSMo 1959, quoted supra, makes real and tangible personal property located in Missouri and belonging to foreign insurance companies subject to ad valorem taxation as though owned by individuals, and such statute does not prescribe any exemption from such ad valorem taxation.

Missouri's statute authorizing a tax on premiums of foreign insurance companies is Section 148.340 RSMo 1959, reading as follows:

"Every insurance company or association not organized under the laws of this state, shall, as provided in section 148.350, annually pay tax upon the direct premiums received, whether in cash or in notes, in this state or on account of business done in this state, for insurance of life, property or interest in this state at the rate of two per cent per annum in lieu of all other taxes, except as in sections 148.310 to 148.460 otherwise provided, which amount of taxes shall be assessed and collected as herein provided; provided, that fire and casualty insurance companies or associations shall be credited with canceled or return premiums actually paid during the year in this state, and that life insurance companies shall be credited with dividends actually declared to policyholders in this state, but held by the company and applied to the reduction of premiums payable by the policyholder."

Section 148.400 RSMo 1959, provides:

"All insurance companies or associations organized in or admitted to this state may deduct from premium taxes payable to this state, in addition to all other credits allowed by law, income taxes, franchise taxes, personal property taxes, valuation fees, registration fees and examination fees paid under any law of this state."

From a review of Sections 148.310 to 148.460 RSMo 1959, and with special reference to Section 148.400 RSMo 1959, quoted above, it must be concluded that such statutes do not make provision allowing

Honorable C. Lawrence Leggett

a foreign insurance company doing business in Missouri to deduct from its premium tax levied under Section 148.340 RSMo 1959 any ad valorem taxes levied against real estate owned by such foreign insurance company in Missouri.

In your request for this opinion you have disclosed that you employed Missouri's retaliatory law found at Section 375.450 RSMo 1959 in assessing premium taxes against the foreign (California) company involved. We now must review Missouri's retaliatory law to determine the principle directive therein. Section 375.450 RSMo 1959 provides as follows:

"1. When by the laws of any other state or foreign country any premium or income or other taxes, or any fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions are imposed upon Missouri insurance companies or carriers doing business, or that might seek to do business in such other state or country, which in the aggregate are in excess of such taxes, fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon insurance companies of such other state or foreign country under the statutes of this state, so long as such laws continue in force, the same obligations, prohibitions, and restrictions of whatever kind shall be imposed upon insurance companies or carriers of such other state or foreign country doing business in Missouri. Any tax, license or other obligations imposed by any city, county or other political subdivision of a state or foreign country on Missouri insurance companies or carriers shall be deemed to be imposed by such state or foreign country within the meaning of this section, and the insurance commissioner for the purpose of this section shall compute the burden of any such tax, license or other obligations on an aggregate statewide or foreign-country-wide basis as an addition to the tax and other charges payable by similar Missouri insurance companies or carriers in such state or foreign country. The provisions of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes.

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2. All licenses, fees, taxes, fines or penalties collectible under this section shall be paid to the collector of revenue." (Underscoring supplied)

The last sentence, underscored, found in paragraph 1 of Section 375.450 RSMo 1959, supra, contains a positive directive as follows:

"The provisions of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes."

Until such time as it is determined that the "burdens" mentioned in Section 375.450 RSMo 1959, supra, in the aggregate, to be imposed upon a Missouri company by California exceed such "burdens" to be imposed by Missouri on a California company, we have no reason to retaliate against the California company as directed in Section 375.450 RSMo 1959. This retaliatory statute is not a taxing statute for it does not prescribe a rate of taxation nor does it describe the nature or objects of any tax. It is simply a statute directing retaliation when it is determined that the foreign state's aggregate burdens placed upon a Missouri company are in excess of the aggregate burdens Missouri places upon a like foreign company.

In computing the "aggregate burdens" which may be exacted by either Missouri or California we must of necessity employ the respective statutes of each state, for to do otherwise would place both Missouri and California in the incongruous position of adopting another state's taxing statutes. Once the "aggregate burdens" are computed under both the Missouri and California statutes we are then in a position to compare the "aggregate burdens" of each state and determine for the first time if Missouri's retaliatory law, Section 375.450 RSMo 1959, is to be employed. Having determined to employ the Missouri retaliatory statute we cannot escape the following directive contained therein:

"**The provision of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes.**"

It is not necessary in this opinion to make a close examination of the California statutes in order to rule the question. We have substantiated the statements found in your request for this opinion disclosing that California's basic premium tax rate is 2.35%, and that certain real estate taxes are allowed as a deduction in computing the premium tax under the California statute. It is proper for you to allow the California statutory deduction when computing the premium taxes under the California premium taxing statute as you seek

Honorable G. Lawrence Leggett

the ultimate "aggregate burdens" which California would place on a Missouri company, but only for that purpose. Missouri premium taxes, as well as authorized deductions therefrom, will be determined under Missouri statutes. Employment of the retaliatory law will effect equalization of the "aggregate burdens" between California and Missouri.

In *Life & Casualty Insurance Co. v. Coleman*, 233 Ky. 350, 25 S.W. (2d) 748, 1.c. 750, the Kentucky Court of Appeals spoke as follows, in 1930, in relation to Kentucky's retaliatory law:

"In enacting the retaliatory insurance statute, it was the purpose of the Legislature to equalize the burdens imposed upon foreign and domestic companies. There can be no equalization of the burden unless the taxes levied or the obligations imposed are the same in the aggregate. In order to provide equality, which is the manifest object of the statute, it is not necessary to levy a specific tax to meet a similar tax levied by another state, but, if the aggregate of the taxes collected from a foreign insurance company in the retaliating state equals the tax imposed on foreign insurance companies by the state in which the taxed company is incorporated, the object of the law has been attained. Equality is the result aimed at and is achieved when the ultimate taxes levied are equal, even though they are imposed by different arms of the respective state governments and are applied to different purposes."

In 1939 the Supreme Court of Kansas, in the case of *Employers Casualty Co. v. Hobbs*, 149 Kan. 774, 89 P. (2d) 923, 1.c. 926, 927, spoke as follows in relation to Kansas' retaliatory law:

"Under our statutes, an insurance company organized under the laws of another state or country is required to pay certain specified fees as a condition to its right to do business in this state. In order to insure that insurance companies organized under the laws of this state seeking to do business in another state may be accorded fair treatment, we have the retaliatory statute. * * And we think it clear, both from the standpoint of the end sought to be accomplished by the statute, and the grammatical structure of the statute, that it was never intended there should be a comparison as between

Honorable C. Lawrence Leggett

the statutory requirements of this state and of the state in which the foreign corporation is chartered so that a particular tax should be measured against a like tax in the other state, a particular fee measured against a like fee, etc., nor that taxes should be aggregated and measured against aggregated taxes of the other state, fees aggregated and measured against fees, etc. * * * The word 'amount' refers to all exactions under whatever name and in the aggregate; it is used in the singular, not in the plural, and should not be otherwise interpreted."

Of special interest here is the 1938 decision of the Supreme Court of Montana in the case of Occidental Life Ins. Co. v. Holmes, 107 Mont. 48, 80 P. (2d) 383, where the employment of Montana's retaliatory law against a California company was involved. While the facts of such case made it unnecessary to employ the Montana retaliatory statute, the Supreme Court of Montana quoted approvingly from Life & Casualty Ins. Co. of Tennessee v. Coleman, 233 Ky. 350, 25 S.W. (2d) 748 when using the following language found at 80 P. 2d 383, l.c. 388:

"Equality is the result aimed at and is achieved when the ultimate taxes levied are equal, even though they are imposed by different arms of the respective state governments and are applied to different purposes."

In Employers Casualty Co. v. Hobbs, 152 Kan. 815, 107 P. 2d 715, l.c. 716, the Supreme Court of Kansas, in 1940, spoke as follows in relation to Kansas' retaliatory statute and similar statutes of other states:

"While the provisions of G. S. 1935, 40-253, our so-called retaliatory statute, and similar statutes of other states are designated as retaliatory clauses in insurance circles, the real purpose of these statutes is not retaliation but substantial equality and comity between states and countries. By these statutes states or countries intend to say to each other, we will treat you as you treat us. * * * The actual purpose of such legislation is to equalize the burdens imposed upon foreign and domestic corporations."

Honorable C. Lawrence Leggett

CONCLUSION

It is the opinion of this office that a foreign insurance company licensed to do business in Missouri is prohibited, under Section 148.400 RSMo 1959, from deducting from premium taxes due Missouri amounts paid as ad valorem taxes on real estate the company owns in Missouri, and, other than for the purpose of computing premium taxes under a foreign premium tax statute which authorizes the deduction thereof, such real estate taxes are not to be taken into consideration in determining the aggregate burdens imposed by either Missouri or the foreign state when applying the provisions of the Missouri retaliatory law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M:aa

INSURANCE: Articles of Incorporation of First National and Casualty Insurance Company.

April 12, 1961



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of April 10, 1961, with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed First National Life and Casualty Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Sections 376.010 to 376.670 RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Sections 376.010 to 376.670 RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JLO'N:aa

COUNTY OFFICERS: Person cannot qualify for office of county
COUNTY CORONERS: coroner by becoming a citizen one month after
QUALIFICATION: the beginning of the term.
CITIZENSHIP:

April 25, 1961



Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This is in answer to your opinion request of February 21, 1961, which reads as follows:

"In the 1960 primary election in Audrain County no one was nominated, on any ticket, for coroner. No one was otherwise nominated thereafter as the candidate for coroner on any ticket, so that in the 1960 general election write-in votes, only, were cast for the office of coroner. Doctor Gordon Shaw received the largest number of such votes.

"Doctor Shaw was not a citizen of the United States at the time of that election and he did not become a citizen until in the early part of this month.

"Our County Clerk wrote to the Missouri Secretary of State about this situation, that is, whether or not the Clerk may legally and properly administer the oath of office to Doctor Shaw and issue a commission to him as coroner. The Secretary of State advised the Clerk to seek your opinion on the question. I am respectfully requesting such opinion by you in behalf of our Clerk."

In answering your question, we first turn to the constitutional and statutory provisions relative to the office of coroner.

Honorable Lon J. Levvis

Section 8 of Article VII of the Constitution of Missouri provides as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

Section 58.030, RSMo 1949, gives the qualifications for coroners, and reads as follows:

"No person shall be elected or appointed to the office of coroner unless he be a citizen of the United States, over the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected, six months next preceding the election."

The general question involved in your opinion request is the time as of which the eligibility to the office is to be determined. There is an annotation on this question in 88 ALR 812 which gives an analysis of the problems involved, and we quote from that annotation, pages 812, 813 and 814, as follows:

"On the question as of what time eligibility to public office must be determined, there is great conflict among the courts. Part of this conflict is doubtless due to the varying terminology used in constitutions and statutes of the various states, prescribing the eligibility and qualifications of public officers. But there is considerable disagreement among the courts even when the constitutional and statutory provisions in the respective jurisdiction are substantially identical. Also, the nature of the requisite qualifications has had some bearing

on the ultimate question as to the time as of which they must be determined.

"Where the Constitution or the statute, in terms or by necessary implication, specifies the time when the conditions of eligibility must be present, as where it is required that (a) the qualifications for public office shall exist at the time of the election, there can be no question that the candidate must be eligible at that time, and conditions not present at the time of election, but existing before or coming into existence after such time, which, if existing at the time of election, would have rendered him eligible, can have no such effect. See cases treated under subds. II, b, and VII.

(b) On the other hand, if the Constitution or the statute, in terms or by necessary implication, requires such conditions to exist at the time of the commencement of the term of office, or the time of the induction of the candidate into office and assumption by him of its duties, as distinguished from the time of the election, it is clear that existence of conditions of eligibility at the commencement of the term or induction of the candidate into office is sufficient to qualify him for the office, irrespective of their existence at the time of the election. See cases treated under subd. III, b.

"Where, however, the Constitution or the statute specifies no time for the existence of conditions of eligibility, and such time must be determined by construction of the terms employed, the courts are at wide variance as to the time as of which such conditions must or may exist in order to satisfy the constitutional or statutory requirements.

(a) One group of courts takes the view that the word 'eligible,' as used in Constitution or statute relating to qualification of public officers, has reference to the time of election, and means capacity 'to be elected,'

as distinguished from capacity 'to hold office,' and that therefore a candidate for a public office must be qualified at the time of election, with the result that if not then qualified he may not hold the office although, between the time of his election and the commencement of the term of his office, he has fulfilled all the conditions which, if existing at the time of the election, would have entitled him to hold it.

[Citing cases]

(b) Another group of courts, constituting the majority, takes the view that the word 'eligible' as used in constitutions and such statutes has reference to the capacity not of being elected to office, but of holding office, and that therefore, if qualified at the time of commencement of the term and induction into office, disqualification of the candidate at the time of election is immaterial.

[Citing cases]

(c) Where the qualification provision of the Constitution or statute does not refer to 'eligibility,' but to 'holding' of office, even the courts adopting the view that where no time for determining eligibility is specified, eligibility is ordinarily to be determined as of the time of election, are inclined to hold that removal of disqualification before the time fixed for the commencement of the term of office qualifies the incumbent. [Citing cases] And, a fortiori, it is so held by the courts which subscribe to the contrary view, and the courts whose view is not definitely fixed one way or the other."

In searching for the Missouri law relative to this question, your attention is called to the following cases:

In *State ex rel. Owens v. Draper*, 45 Mo. 355, l.c. 357, the court stated:

Honorable Lon J. Levvis

"By the phrase 'shall not be eligible,' I do not think it was intended to prohibit a person who occupied the position of judge from running for or being elected to the Legislature. But if he should run and be elected, he would have to make his choice of which office he would retain, and his acceptance of one would necessarily operate as a vacation of the other. Therefore it follows that when Owens qualified and took his seat in the Legislature he elected to vacate and abandon the office of circuit judge."

In State ex inf. Major ex rel. Ryors v. Breuer (1911), 235 Mo. 240, 138 SW 515, the court quoted the above language from the Draper case, supra, and then stated, l.c. 516-517:

" * * * The law as declared in that case is directly applicable and controlling upon the point under consideration in the case before us. It may be conceded, and it seems to be the fact, that, as stated in 29 Cyc. 1376, 'Most of the cases hold that the term "eligible" as used in a Constitution or statute means capacity to be chosen, and that therefore the qualification must exist at the time of the election or appointment;' but there is respectable authority to the contrary, including a decision of this court, and we think based upon the better reason."

In State ex inf. Mitchell ex rel. Goodman v. Heath, 132 SW2d 1001, l.c. 1005, the Supreme Court stated:

"It was contended that 'the word "eligible," as used in Constitutions and statutes, concerning elections to office, means the capacity to hold the office at the time of the election, so that the subsequent removal of the disability will not remove the incompetency.' While there are two conflicting lines of authorities on this question in this country, this court held against this contention and decided that the Constitution and statute did not mean eligible at

Honorable Lon J. Levvis

the time of election, but, instead, meant eligible at the time of commencement of the term and of taking possession of the office. See 46 C.J. 949, § 58; 22 R.C.L. 403, § 43; 88 A.L.R. 812 note; 24 R.C.L. 571, § 16.
* * *

When the Constitution or statute does not specify the time when the conditions of eligibility must be present, the above three cases place Missouri with the majority view that eligibility to public office must be determined with reference to conditions existing at the time of commencement of the term of office. In the Draper and Breuer cases, *supra*, the statutory or constitutional provisions involved provided that persons without certain qualifications would not be eligible to hold the office. In the Heath case, *supra*, the statute provided that persons should have certain qualifications within a period of time preceding their election to the office. In none of these cases was the statutory or constitutional provision as strong or as clear as Section 8 of Article VII of the Constitution or Section 58.030, RSMo 1949, quoted above and referring to the office of coroner. Both the constitutional and statutory provisions quoted above explicitly say that no person shall be elected or appointed to the office unless he be a citizen of the United States.

Three Missouri cases dealing with the office of school commissioners or county superintendents of schools are: State ex rel. Weed v. Meek, 129 Mo. 431, 31 SW 913; State ex inf. Chinn, Prosecuting Attorney, ex rel. Botts v. Hollowell, 288 Mo. 674, 233 SW 405; and State ex inf. Burgess, Prosecuting Attorney, ex rel. Hankins v. Hodge, 320 Mo. 877, 8 SW2d 881. These cases construed qualification statutes which required the officeholder to "hold a certificate" or "diploma" at the "time of his election" or "when elected." All three cases held that the qualification must be present at the time of the election in compliance with the language of the statute. The case of State v. Heath, *supra*, is a more recent case than these three cases and could be construed to weaken this holding, since the statute in that case provided that school directors should "have paid a state and county tax within one year next preceding his, her or their election" and the court held that the payment of taxes prior to the time prescribed for taking the oath of office would comply with the requirements of the statute. However, we are not required to choose between these views. In either situation, the person described in your opinion request is not qualified.

Honorable Lon J. Levvis

Under the facts stated in your opinion request it is clear that Dr. Shaw is not within the express provisions of the Constitution and statute that the coroner must be a citizen at the time of his election. Also, under the facts of the opinion request, he was not qualified prior to the time of the commencement of the term of office, and he cannot come under the rule of the three Missouri cases cited above that the time of his eligibility should be determined as of the time of the commencement of the term of office.

Section 58.020, RSMo 1949, provides as follows:

"At the general election in the year 1948, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a coroner who shall be commissioned by the governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each coroner shall enter upon the duties of his office on the first day of January next after his election."

Thus, the term of office for coroner would begin on the first day of January, 1961. In your opinion request you stated that Dr. Shaw did not become a citizen until the early part of February, 1961, and therefore he did not qualify prior to the commencement of the term of office.

This office issued an opinion on March 29, 1950, to Mr. Duncan J. Jennings, Prosecuting Attorney of Montgomery County, holding that a person who was not eligible to hold the office of probate judge on the date of the commencement of the term of office cannot qualify for the office four months after the beginning of the term. This office feels that this holding in the previous opinion is still valid.

The plain language of the Constitution and statute, and the decisions in the Meek, Hollowell and Hodge cases, show that Dr. Shaw is not qualified for the office of coroner because he was not a citizen at the time of his election. Dr. Shaw would not be qualified for the office of coroner because he was not a citizen at the time of the commencement of the term of office of coroner, and he therefore cannot come within the provisions of the Missouri view expressed in the Breuer and Heath cases.

Honorable Lon J. Levvis

Following this reasoning, we must hold in the instant case that Dr. Shaw was not qualified to be elected to the office of coroner at the time of the election in November, 1960, and he was not qualified to hold the office of coroner on the day of the commencement of the term of that office because he was not a citizen. Because he was not qualified under either situation, he is not entitled to take the office of coroner at a later date by virtue of his election thereto, even though he subsequently removes the disqualification of lack of citizenship by becoming a citizen one month after the date of the commencement of the term of office.

CONCLUSION

It is the opinion of this office that a person who is not a citizen and therefore not eligible to hold the office of coroner on the day of his election and on the day of the commencement of the term of office could not thereafter be qualified to take the office by becoming a citizen one month after the beginning of the term.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

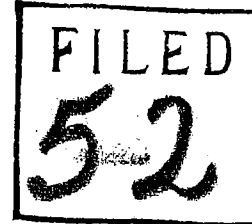
Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW:ml

INSURANCE: Described "plan" offered by Southwest Blood Banks, Incorporated, is a contract of insurance, and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310 RSMo 1959.

August 16, 1961



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

In answer to your request of March 2, 1961, this opinion reviews the Southwest Blood Service Plan offered to residents of Missouri by Southwest Blood Banks, Incorporated, a not-for-profit corporation under the laws of Arizona, and presently licensed to conduct its business in Missouri under Chapter 355 RSMo 1959, Missouri's General Not For Profit Corporation Law.

The Southwest Blood Service Plan, hereinafter referred to as the "plan", is being examined with a view to determining if it is, in point of law, a contract of insurance, the issuance of which is subject to the provisions of Section 375.310 RSMo 1959, providing in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred dollars for each offense, * * *."

Membership in the "plan" is acquired by completing an application for membership found in circular form SP603, and the subsequent issuance of a Certificate of Membership, the essential features of which will be referred to herein.

Missouri's statutes do not define the term "insurance". In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 257 Mo. 529, 1.c. 535, 165 S.W. 1084, the essential elements of a contract of insurance are alluded to in the following language:

Honorable C. Lawrence Leggett

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him'."

In Richards On Insurance, Fifth Edition. Vol. 1, Sec. 4, p. 11, we find the following:

"Where statutory definition is lacking, what constitutes 'insurance' is left to judicial decision and temperament."

At 44 C.J.S., Insurance, Sec. 59, p. 528, we consider the following language appropriate as an introduction to our problem:

"Whether a company is engaged in the insurance business depends, not on the name of the company, but on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of business, and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business. In determining whether a business is an insurance business, the nature of the contract or forms in which the parties state their relations must be considered, and whether a contract is one of insurance is determined by its purpose, effect, contents and import, and not merely from its terminology, although it does not, on its face purport to be one of insurance, and even though it contains declarations to the contrary."

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The following admonitions are not to be overlooked when considering whether an association is unlawfully engaged in the insurance business, and are found at 44 C.J.S., Insurance, Section 70, p. 549:

"The prohibition against engaging in the business of insurance without the prescribed authority is held absolute. In determining whether or not an association is engaged in the business of insurance in violation of law, the court is concerned with the plan as a whole and not with artificially segregated single phases of the plan."

We next summarize the important provisions contained in the application form and certificate of membership which go to make up the agreement between Southwest Blood Banks, Incorporated, and persons holding its membership certificates.

The application for membership in Southwest Blood Banks, Incorporated, is made on an individual basis, or on a family membership basis, with individual membership fee being \$1.00 and family membership fee being \$3.60, and to such initial membership fees is added an enrollment fee of \$1.00. Except for blood transfusions required as a result of accidental injuries, eligible members are not entitled to any benefits under the "plan" for (90) days after the date the application is accepted. In executing the application the applicant agrees:

"* * * that services of the Plan are not available with respect to transfusions resulting from any of the following diseases or conditions existing on the date of acceptance of the application for membership: hemophilia, leukemia, aplastic anemia, ulcers, pulmonary tuberculosis, cancer, or congenital cardiovascular diseases requiring surgery, nor are such services available with respect to transfusions resulting, during the first twelve months of membership, from acquired cardiovascular diseases requiring surgery."

We next look to the Certificate of Membership issued under the "plan", and find that membership is on an annual basis, and renewal is optional with Southwest Blood Banks, Incorporated, "upon payment of the established fee, subject, however, to such general changes in the program as the Corporation may determine to be necessary, based upon experience and as may be set forth

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in current edition of Southwest's Conditions of Service to Members".

Under Article III of the Certificate of Membership we find that services of the "plan" available to members are "with respect to all transfusions of whole blood required by any of such persons during the term of membership", with the exceptions heretofore outlined in the application and restated again in Article III of the Certificate of Membership.

It is to the actual services to be rendered under the "plan" to the member that we must look in order to determine just what the member obtains in return for his membership fee. Such services are furnished in one of two different manners fully described in the following language from Article III, Paragraph 2 of the Certificate of Membership:

"* * * the Corporation will provide the services of the Plan in one of the following manners:

a. If the whole blood used for transfusion purposes was issued by any Southwest Blood Bank, the actual charge for such whole blood will be wholly eliminated.

b. If the whole blood used for transfusion purposes was not issued by a Southwest Blood Bank, then the Corporation will replace the blood, unit for unit, either directly to the blood bank or transfusing person or institution supplying the blood, or through the Blood Bank Clearing House Program of the American Association of Blood Banks."

We have searched the language of the application as well as the Certificate of Membership in connection with the "plan" and have found no reference to any unit cost for whole blood transfusions, but we do find that in those instances where whole blood used for transfusion purposes was issued by any Southwest Blood Bank, the actual charge for such whole blood will be wholly eliminated. In those instances where the whole blood used for transfusion purposes was not issued by a Southwest Blood Bank, the Southwest Blood Banks, Incorporated, will replace the blood, unit for unit.

Southwest Blood Banks, Incorporated, has cited us to the fact that its method of operation "has resulted in a uniform \$20-per-unit charge for transfusion blood throughout the area of service", where formerly the local charge by profit-operated blood banks was as high as \$65.00 per unit. Such observation allows us to conclude that blood transfusions which become

Honorable C. Lawrence Leggett

necessary for members of Southwest Blood Banks, Incorporated, will cost the corporation a minimum of \$20.00 per unit charge for the transfusions given to its members. Here we have the thing of value purchased by the annual membership fee and enrollment fee to be paid by those who become members of Southwest Blood Banks, Incorporated.

In the light of the foregoing analysis of the "plan", we now state briefly what we consider the "plan" involves:

For and in consideration of an annual membership fee of one dollar, together with an enrollment fee of one dollar, Southwest Blood Banks, Incorporated, agrees to wholly eliminate the actual charge for all transfusions of whole blood required by an individual member, or to replace such blood, unit for unit, during the life of such membership, with some stated exceptions pertaining to particular diseases or conditions.

In this plan we find that for a very nominal consideration measured by the annual membership and enrollment fee (such consideration bearing no true relationship to the cost or value of the service to be rendered), Southwest Blood Banks, Incorporated, undertakes to hold its member free from financial obligation in relation to whole blood transfusions which the member may require during the period of membership. In the language heretofore quoted from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 247, Mo. 529, 1.c. 535, this "plan" certainly involves "an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss". When Southwest Blood Banks, Incorporated, wholly eliminates the actual charge for transfusions of whole blood, or replaces such blood, we can hardly escape the conclusion that the member has been indemnified or compensated for the obligation that becomes his on the happening of the contingency, the blood transfusion, which motivates the member to take out the membership certificate.

Proponents of the "plan" have cited to us the case of Jordan v. Group Health Association, 107 F. 2d 239, as being concerned with a situation analogous to the "plan" we are considering, and suggest that such ruling should control in relation to this "plan" being considered. A brief reference to the nature of the contract for services which was being considered in Jordan v. Group Health Association, supra, will readily point up the difference between that fact situation and the fact situation confronting us under Southwest's "plan". At 107 F. 2d 239, 1.c. 243, 244, we find the United States Court

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of Appeals in the Jordan case discussing the agreement in the following language:

"The effect of the agreement or arrangement is to make available to members, if they wish to receive them, the services of the physicians contracted for by Group Health; but it is specifically provided that (1) Group Health cannot and will not regulate or control the physician in his work -- he is left free, in fact required, to exercise his own judgment entirely independently as to diagnosis and treatment; (2) the only obligation which Group Health assumes toward its members is to make contracts, of the character described, with physicians and others -- there is no agreement or binding obligation to provide the service or see that it is supplied; the undertaking is to contract for the rendition of the services by independent contractors, not to supply them at all events or contingently; (3) further, the Trustees may determine or modify the extent of service so made available (presumably as to all members collectively) at any time on fifteen days written notice; (4) the Medical Director may determine the extent of the services which will be available to members in each individual case; (5) the corporation does not guarantee that any of the services will be rendered, or that any contracting physician will perform his contract to supply them; (6) the corporation assumes no liability for his failure to do so or for any act of omission or commission by him in doing so or for any breach of his contract; and (7) finally, Group Health assumes no liability, if for any reason it becomes unable to procure any or all such services when called upon to do so, or to indemnify the members for failure of the physician to keep his agreement or perform it properly, and its only obligation in such a case is 'to use its best efforts to procure the needed services from another source'. This is the basic contract relating to the primary service." (Underscoring supplied)

A reading of the foregoing quotation from Jordan v. Group Health Association, supra, in the light of provisions of the

Honorable C. Lawrence Leggett

"plan" proffered by Southwest Blood Banks, Incorporated, and heretofore discussed in detail in this opinion, discloses two entirely different factual situations. In the Jordan case it appears clearly that the contract in issue did not embrace characteristics necessary to cause it to be denominated a contract of insurance. In the "plan" being here reviewed it is apparent that it has embraced therein those essential qualities so lacking in the contract construed in the Jordan case. The Court's decision in the Jordan case, *supra*, contains a valuable expression in relation to "insurance" and "indemnity" which we desire to adopt as basic reasoning in support of the final conclusion to be reached in this opinion. The Court spoke as follows at 107 F. 2d 239, *l.c.* 244, 245:

"It is unnecessary for us to attempt formulation of an all-inclusive or exclusive definition of insurance or of indemnity, or to distinguish them sharply. While the basic concepts are not identical and each has varied legal usages, they have common and primary elements which are controlling here. Fundamentally each involves contractual security against anticipated loss. Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance and indemnity require these elements. Hazard is essential and equally so a shifting of its incidence. If there is no risk, or there being one it is not shifted to another or others, there can be neither insurance nor indemnity. Insurance also, by the better view, involves distribution of the risk, but distribution without assumption hardly can be held to be insurance. These are elemental conceptions and controlling ones."

The case of *California Physicians' Service v. Garrison* (1946) 28 C. 2d 790, 172 P. 2d 4, is not dissimilar to the holding in *Jordan v. Group Health Association*, *supra*, and the California Supreme Court held, at 28 C. 2d 790, *l.c.* 807, that there was a "total lack of a promise by the corporation to the beneficiary members to render medical care." It should be noted that California statutes authorized the organization of corporations such as *California Physicians' Service*, and to that limited extent California's social policy in regard to the corporate practice

Honorable C. Lawrence Leggett

of medicine had been determined and that the courts were bound thereby. In the California case two of the six Justices of the Supreme Court concurred only in the judgment. One of these, Chief Justice Gibson, wrote a concurring opinion in which he stated, in part, at 28 C. 2d 790, 1.c. 811, 812:

"I cannot, however, concur in that portion of the opinion declaring that the plaintiff is exempted from regulation by the Insurance Commissioner because it is not engaged in the business of transacting insurance, but is merely agreeing to render service. The true test is not the character of the consideration agreed to be furnished, but whether or not the contract is aleatory in nature. A contract still partakes of the nature of insurance, whether the consideration agreed to be furnished is money, property or services, if the agreement is aleatory and the duty to furnish such consideration is dependent upon chance or the happening of some fortuitous event. (See Rest., Contracts, §291.) In the present case, the agreement is to make payments to member doctors for medical services to the beneficial members, and the duty to make such payments is obviously dependent upon chance or the happening of a fortuitous event, since the necessity for the services, and also for the agreed payment, is dependent upon the member's sickness or accidental injury."

In the case of Cleveland Hospital Service Association v. Ebright (1943) 142 O.S. 51, we find that Ohio had a statute specifically authorizing the incorporation of not-for-profit corporations for the purpose of establishing, maintaining and operating a non-profit hospital service plan. The principal issue was whether the service corporation was subject to the franchise tax levied on other domestic insurance companies. It was there held that since the service corporation had paid taxes levied under its law of incorporation it would not be liable for the franchise tax levied upon other domestic insurance companies, (142 O.S., 1.c. 56). However, in relation to the service contracts written by Cleveland Hospital Association the Supreme Court of Ohio, at 142 O.S. 1.c. 55, had the following to say concerning the ruling of the Court of Appeals in such case:

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"The Court of Appeals found that the contracts written by the plaintiff amounted substantially to contracts of insurance, relying on State, ex rel. Duffy, Atty. Genl., v. Western Auto Supply Co., 134 Ohio St., 163, 16 N.E. (2d), 256, 119 A.L.R., 1236; State, ex rel. Herbert, Atty. Genl., v. Standard Oil Co., 138 Ohio St., 376, 35 N.E. (2d) 437. With that conclusion we are in complete accord."

CONCLUSION

It is the opinion of this office that the within described Southwest Blood Service Plan offered by Southwest Blood Banks, Incorporated, effects a contract of insurance within the meaning of Section 375.310 RSMo 1959, and offering of the same to the public without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons and corporations selling certificates of membership in such plan to be subject to penalties prescribed by Sections 375.300 and 375.310 RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

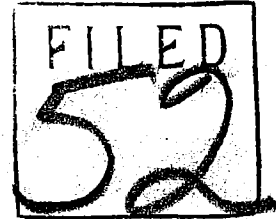
Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'H:aa

INSURANCE: Sec. 375.300 RSMo 1959 requiring licensing of insurance agents not applicable to Standard Oil Company of Indiana in its exclusive use of the mails in soliciting its credit card customers in Missouri from the office of Standard Oil Company in Illinois to purchase insurance and pay for the same through the medium of such credit cards.

August 22, 1961



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is in answer to your request as to whether certain activities of Standard Oil Company of Indiana carried on in Missouri through the mails constitute acting as an insurance agent in this State so as to require those who carry out such activities to be licensed in Missouri as insurance agents or brokers. The activities you refer to are best illustrated by the following circular which we quote in its entirety:

"Dear Standard Customer:

"We are pleased to announce a new service which makes it possible for you to use the credit you have established as a Standard Credit Card Holder to purchase liberal Travel-Accident Insurance for yourself and your wife (or husband) and have it charged semi-annually on your Standard Credit Card statements.

"A careful examination of many travel-accident policies led us to select the one offered by Bankers Life and Casualty Company of Chicago (In Wisconsin by Dubuque Fire and Marine Insurance Company), 4444 West Lawrence Avenue, Chicago, Illinois, which we feel really meets the needs of our Credit Card Holders, and at a reasonable cost.

"Briefly, it provides that:

If you are in an accident while driving or riding in a private

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automobile or while riding in a 'common carrier' (bus, train, plane, taxicab, etc.) or if you are struck by any of these vehicles, the policy will pay . . . \$25,000 if you are killed or if you lose both arms, both legs or the sight of both eyes, or any two members . . . \$12,500 if you should lose one arm or leg, or the sight of one eye.

"Details of this coverage are summarized on the back of this letter. After your application is received, a charge of \$10.00 will be added to your regular bill every six months. Your insurance policy will be mailed to you by the insurance company.

"To apply, simply fill in the blanks on the enclosed application and have your wife or husband fill in his or her portion if he or she also wishes insurance. Then return the application in the enclosed envelope.

"DO NOT SEND ANY MONEY FOR INSURANCE WITH YOUR APPLICATION. . . YOU WILL BE BILLED ON YOUR NEXT MONTHLY STATEMENT! In the meantime, however, your insurance will become effective on the first day of the month following receipt of your application.

"We strongly recommend this Travel-Accident Insurance and suggest that you carefully consider its many valuable features, not the least of which is the ability to pay premiums through your Standard charge account just as you charge Standard Gasoline and other products.

Sincerely yours,

/s/ D. F. Benton
Vice-President"

"PRINCIPAL POLICY PROVISIONS

"Insures you anywhere in the world against accidental loss of life, limb or sight resulting from injury sustained while riding as a passenger in (but not as an operator

Honorable C. Lawrence Leggett

of), boarding or alighting from any air, land or water common carrier (a vehicle licensed to carry passengers for hire); or while in, operating, entering or alighting from any private passenger automobile licensed as such by the State or Country of its registry; or through being struck by any automobile or common carrier. The word 'Automobile' means a land motor vehicle not operated on rails or crawler treads and does not mean farm type tractors nor any equipment designated for use principally off public roads.

"\$25,000 will be paid if within 180 days from the date of the accident such injury results in loss of life, both hands or both feet, one hand and one foot, entire sight of both eyes, or entire sight of one eye and one hand or one foot. \$12,500 will be paid for loss of one hand or one foot or entire sight of one eye.

"The policy does not cover loss resulting from suicide or self-destruction, bacterial infections, medical or surgical treatment, war or act of war, while in the armed forces of any country at war, any vehicle being tested, time tested or participating in races, speed contests or exhibitions.

"The policy is issued for six months at a premium of \$10.00 and may be renewed with the consent of the insurance company by payment of \$10.00 on the first day of each successive six months period thereafter.

"The above describes briefly the most significant features of this insurance. A policy will be issued to every credit card holder and wife or husband who applies."

Certain facts are obvious from the language of the circular quoted above. Standard Oil Company of Indiana, directs the circular through the mails from its office in Chicago, Illinois to its credit card holders in Missouri. A brief description of the insurance contract being offered by Fankers Life and Casualty Company of Chicago to Standard credit card

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holders in Missouri is contained in the circular, and Standard Oil recommends to its customers that they consider the "many valuable features" of the Travel-Accident Insurance offered, "not the least of which is the ability to pay premiums through" the Standard charge account just as Standard gasoline and other products are charged.

Along with the circular mailed to the credit card holders is included form AD-7811-5 which carries the Standard emblem and reads as follows:

"Why not enclose this with your payment?

"Standard Oil Company (Indiana)
165 North Canal Street
Chicago 6, Illinois

"Gentlemen:

"Without obligation, please send me complete information about the \$25,000 Travel-Accident Insurance Policy available to Standard Oil Credit Card customers. I understand the cost is only \$10 each six months and can be billed on my Credit Card account.

name _____

street address _____

city _____ state _____

my credit card number _____ "

It is apparent that Standard Oil Company is the professed agent of Bankers Life and Casualty Company of Chicago, Illinois to circularize Standard Oil credit card holders in Missouri, by mail, to apply for the insurance in question, and that as agent for the insurance company it will accept payment of the premium for transmission to the insurance company. It must be noted that the circular provides that the insurance policy will be mailed to the credit card holder by the insurance company. No facts are presented which indicate that any Standard Oil Company agent in Missouri aids in effectuating this insurance.

Our principal inquiry goes to the question of whether Standard Oil Company, by virtue of the activities above described,

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is to be considered an insurance agent within the following language from Section 375.300 RSMo 1959:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by Section 375.010, * * * shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

Under Section 375.300 RSMo 1959, cited above, the agent must carry out his act of agency in Missouri. It is apparent that the acts of Standard Oil Company, in soliciting its credit card customers on behalf of Bankers Life and Casualty Company of Chicago, are carried on through the mails from its office in Illinois and not by its corporate agents present in Missouri. At this point we submit the following language from *Selby v. Crown Life Insurance Company*, Mo. App., 189 S.W. 2d 135, 1.c. 138:

"It is the settled rule that where an insurance company, acting outside the state, accepts the application of a resident of the state which is sent directly to it without the intervention of any one of its agents, and thereupon issues a policy in accordance with the application, such policy is a policy of the state in which it is issued, and the company's issuance of it under such circumstances does not constitute the doing of business in the state in which the insured resides."

Following the ruling in *Selby v. Crown Life Insurance Company*, supra, it may reasonably be concluded that Bankers Life and Casualty Company, by entering into the particular insurance contracts, only through the medium of the mails, is not doing an insurance business in Missouri, and it necessarily follows that acts of its agents, Standard Oil Company, in soliciting and aiding in fully effecting such insurance contracts, only through the medium of the mails from its office in Illinois is not performing in Missouri the

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acts of an insurance agent in violation of Section 375.300 RSMo 1959.

CONCLUSION

Section 375.300 RSMo 1959, requiring insurance agents to be licensed does not apply to Standard Oil Company of Indiana in its exclusive use of the mails in soliciting its credit card customers in Missouri from the office of Standard Oil Company in Illinois to purchase insurance and pay for the same through the medium of such credit cards.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

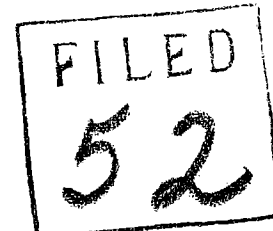
Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO:M:aa

INSURANCE: Amended Articles of Incorporation of Survivor's
Benefit Insurance Company.

September 18, 1961



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This opinion is rendered in reply to your inquiry of September 6, 1961, which was accompanied by a copy of amended Articles of Incorporation of Survivors' Benefit Insurance Company, together with a record of the proceedings of said corporations directors taken on September 5, 1961. By such actions Survivors' Benefit Insurance Company, a stipulated premium plan life insurance company operating under Chapter 377 RSMo 1959, has accepted the provisions of Missouri's regular life law found at Sections 376.010 to 376.670 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 377.450 and 376.070 RSMo 1959. It is the opinion that said documents are legally sufficient as to form. As to contents of the amended Articles of Incorporation, attention is directed to paragraph 1 of Article V, thereof where it is provided that the corporate powers of the corporation are to be exercised by a board of directors consisting of not less than three nor more than twenty-one members. In order that such provision may be consistent with Section 376.060 RSMo 1959, the board of directors should consist of not less than nine nor more than twenty-one members.

With the exception noted in the previous paragraph, it is the opinion of this office that the amended Articles of Incorporation, and record of proceedings had by the directors of Survivors' Benefit Insurance Company on September 5, 1961,

Honorable C. Lawrence Leggett

are in accord with the provisions of Chapter 376 RSMo 1959 and Section 377.450 RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JLO:H:aa

INSURANCE: Articles of Incorporation of United Investors Life
Insurance Company

September 18, 1961



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of September 13, 1961, with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed United Investors Life Insurance Company, together with a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.070 RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JLO'M:aa

CHILD:

JUVENILE COURT:

JUVENILES:

MAGISTRATE COURT:

POLICE COURT:

Pursuant to Section 211.06 (2) RSMo 1959, a magistrate or police judge must forthwith transfer the case or refer the matter of an individual between 17 and 21 years of age charged with the violation of a state law or a municipal ordinance committed by said individual after he attained 17 years of age, to the juvenile court, if the juvenile court had obtained exclusive original jurisdiction of said individual under Section 211.031 RSMo 1959, prior to his seventeenth birthday, and had placed said individual on probation.

November 7, 1961

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County - Courthouse
Mexico, Missouri



Dear Mr. Levvis:

This is in reply to your opinion request of September 26, 1961, wherein you state:

"I wish that you would please let me have your opinion on the following question. Assuming that in proceedings in the juvenile court of a county of the third class a child under seventeen years of age has been found guilty of having committed an offense against the law and has been returned or committed, under supervision, to the custody of his parents, and that while he was under such supervision said child had become seventeen years of age, and that he is alleged to have committed another offense, namely, a traffic violation, while of that age and has been arrested and brought before the magistrate court of said county, may such later offense be prosecuted in the magistrate court or must that court, under the provisions of section 211.061, transfer that case to the juvenile court?"

Section 211.061(2) RSMo 1959, directs a magistrate or police judge to transfer or refer an individual's case to the juvenile court in two instances. Said section reads as follows:

"If any person is taken before a magistrate or police judge of another court, and it is then, or at any time thereafter, ascertained that he was under the age of seventeen years at the time he is alleged to have committed the offense, or that he is subject to the jurisdiction of the juvenile court as provided by sections 211.011 to 211.431, it is the duty of the magistrate or judge forthwith to transfer the case or refer the matter to the juvenile court, and direct the delivery of such person, together with information concerning him and the personal property found in his possession, to the juvenile officer or person acting as such. The juvenile court shall proceed as in other cases instituted under sections 211.011 to 211.431."

Since the individual in question has committed the traffic offense, for which he was charged in magistrate court, after he became seventeen years of age, his cause could be transferred or referred to juvenile court by the magistrate only if he was subject to the jurisdiction of the juvenile court as provided by Sections 211.011 to 211.431, RSMo 1959.

From the facts as outlined in your letter, the juvenile court obtained exclusive jurisdiction over the individual while he was under seventeen years of age by finding him guilty of having committed an offense against the law of Missouri. This exclusive jurisdiction is set forth in Section 211.031 (1) (d), which states:

"Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

"(1) Involving any child who may be within the county who is alleged to be in need of care and treatment because:"

"(d) The child is alleged to have violated a state law or a municipal ordinance;"

In addition thereto, by statute, the juvenile court not only acquires jurisdiction of the child under the provisions of Sections 211.011 to 211.431, RSMo 1959, but also may retain said jurisdiction over the individual until

he has attained the age of twenty-one years, except where the individual has been committed to and received by the state board of training schools. Said Section 211.041, RSMo 1959, states:

"When jurisdiction over the person of a child has been acquired by the juvenile court under the provisions of sections 211.011 to 211.431 in proceedings coming within the applicable provisions of section 211.031, the jurisdiction of the child may be retained for the purpose of sections 211.011 to 211.431 until he has attained the age of twenty-one years, except in cases where he is committed to and received by the state board of training schools."

Since the language of Section 211.041, RSMo 1959, empowering the juvenile court to retain jurisdiction of a child until he attains the age of twenty-one years, is permissive, the juvenile court must in some manner indicate its intention to retain this jurisdiction.

On July 8, 1959, this office, in an official opinion to Dr. Addison M. Duval, Director of the Division of Mental Diseases, concerning the jurisdiction of the juvenile court under Section 211.041, RSMo 1959, stated at page 2 thereof:

". . . in view of the permissive language of Section 211.041, supra, the court's order disposing of the child must affirmatively show an intention to retain jurisdiction of a child either by express language or necessary inference if, in fact, the court does intend for its jurisdiction to continue."

In the present case, the juvenile court has clearly indicated its intention to retain jurisdiction over this particular individual until he attained the age of twenty-one years by placing him on probation and releasing him to the custody of his parents. Therefore, the magistrate judge would be obliged to transfer this case or refer the matter to juvenile court under Section 211.061(2), RSMo 1959, even though the violation occurred after said individual had reached his seventeenth birthday, because: "he is subject to the jurisdiction of the juvenile court as provided by sections 211.011 to 211.431 . . ."

It is to be noted, however, that Section 211.071, RSMo 1959, gives the juvenile court the power in this type

of case to dismiss the referred matter in juvenile court and allow the individual to be prosecuted under the general laws of the state.

CONCLUSION

It is the opinion of this office that pursuant to Section 211.061(2), RSMo 1959, a magistrate or police judge must forthwith transfer the case or refer the matter of an individual between 17 and 21 years of age charged with the violation of a state law or a municipal ordinance committed by said individual after he attained seventeen years of age, to the juvenile court, if the juvenile court had obtained exclusive original jurisdiction of said individual under Section 211.031, RSMo 1959, prior to his seventeenth birthday, and had placed said individual on probation.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD:lc

CIVIL DEFENSE: Constitutional Amendment #1 adopted November 8, 1960, provides in Section 46 of the Amendment that emergency powers are granted to the Legislature only after an enemy attack. If the Legislature passes laws with such emergencies in view before an enemy attack, it must do so within the powers presently granted to that body and the constitutional restrictions ordinarily imposed upon any legislation.

February 15, 1961



Mr. Dean Lupkey
Director
Civil Defense Agency
Jefferson City, Missouri

Dear Mr. Lupkey:

This is in reply to your letter of January 27, 1961, requesting an opinion from this office as to whether the legislature may presently provide for the emergency conditions of an enemy attack under the emergency powers granted to that body by Section 46 (a) of Article III of the Missouri Constitution as amended by approval of the voters at the last election on November 8, 1960. Section 46 (a) provides:

"The General Assembly, in order to insure continuity of state and local governmental operations in periods of emergency only resulting from disasters occurring in this state caused by enemy attack on the United States, shall have the power to such extent as the General Assembly deems advisable. In the event there occurs in this state a disaster caused by enemy attack on the United States, the General Assembly shall immediately convene in the City of Jefferson or in such place as designated by joint proclamation of the highest presiding officers of each house, and shall have power

(1) To provide by legislative enactment for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying

Mr. Dean Lupkey

on the powers and duties of such offices,
and

(2) To adopt by legislative enactment such other legislation as may be necessary and proper for insuring the continuity of governmental operations. Notwithstanding the power conferred by this section of the constitution, elections shall always be called as soon as possible to fill any elective vacancies in any office temporarily occupied by operation of any legislation enacted pursuant to the provisions of this section." (Emphasis ours.)

Your attention is called to the second sentence of Section 46, supra, and in particular to the underscored portion thereof. We interpret this provision to mean that the general assembly is given the power in the event of the extraordinary conditions of an enemy attack to enact emergency measures to the extent provided by that amendment, but these powers are not granted to the general assembly in the absence of such a national emergency. Therefore, the general assembly in enacting Civil Defense legislation at any time before such an emergency arises must act within the powers granted to the general assembly and within the present framework of government.

CONCLUSION

Therefore, it is the opinion of this office that Constitutional Amendment No. I, adopted by the voters on November 8, 1960, provides extraordinary legislative powers to the general assembly only in the event of disaster through enemy attack and any legislation presently enacted with such emergency in view must be enacted within the present powers granted to the legislature by the Missouri Constitution.

This opinion was written by my assistant Jerry B. Buxton.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JBB:aa

CIRCUIT COURT: Old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal are
OLD RECORDS: records belonging to office of the circuit clerk, and
Storage of shall be kept at clerk's office within meaning of
Sec. 483.065 RSMo 1949, and cannot be removed except in
case of danger from invading enemy as provided by
Sec. 483.070, RSMo 1949. To provide additional space for
more current records, clerk may remove said old circuit
court witness books, minute books, transcripts of judgments and transcripts on appeal from their usual places
in his office and store them in another room of same
office without violating Sections 483.065 and 483.070,
RSMo 1949, if right of access and control over storage
room is in clerk only, and room is not used jointly by
clerk and other county officials.

March 10, 1961



Honorable Richard E. McFadin
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. McFadin:

This is to acknowledge receipt of your recent request for
a legal opinion of this office, which reads as follows:

"Our office has had numerous requests from
different county officials concerning the legality
of storing old books, records, etc. outside of
their offices in order that they may have more
room for more current records.

"My last request, made October 15, 1960 was
from the Circuit Clerk, Mr. Clifford G. Hall,
for information on the feasibility of storing
some of their old witness books, minute books
and transcripts which have not been used in the
past 15 to 50 years, in some other place other
than that of his office.

"I would appreciate having a opinion on this
matter so that I may so advise Mr. Hall and
other County officials of the correct procedure."

We understand the inquiry to be whether or not the circuit
clerk of your county is authorized to remove old circuit court
witness books, minute books and transcripts from his office and
store them elsewhere. We note your statement that these old
records have not been used in the past 15 to 50 years.

The inquiry fails to indicate the kind of transcripts to
which it refers, but for the purposes of our present discussion

Honorable Richard E. McFadin

it will be assumed the reference is to transcripts of judgments coming from other courts and which transcripts may be filed with the circuit clerk, and transcripts on appeal to which further reference will be made in the course of our discussion. All statutory references herein are to RSMo 1949, unless otherwise stated.

Section 476.010, enumerates the courts of record of Missouri including circuit courts, consequently, Sections 483.065 and 483.070 referred to later in our discussion, are applicable to clerks of circuit courts.

Chapter 483, RSMo 1949, is entitled "Clerks of Courts of Record and Court Records". It deals generally with clerks of all courts of records and its provisions are fully applicable to clerks of circuit courts.

Section 483.065, provides where the office of a clerk of a court of record and such clerk's records shall be kept. Said section reads as follows:

"Each clerk shall keep his office at such places as the court shall direct, not to be more than two hundred yards from the courthouse or permanent place of holding the court of which he is clerk, and shall there keep the records, papers, seal and property belonging to his office and transact his official business."

Section 483.070 provides when the clerk of a court of record may remove the official records from his office, and reads as follows:

"In case of danger from an invading enemy any clerk may remove the records, papers and other things appertaining to his office to some secure place until the danger is removed."

From the foregoing, it is readily seen that circuit court witness books, minute books and transcripts of judgments and transcripts on appeal, all records, papers and property belonging to his office within the meaning of Section 483.065, supra, and said records, papers and property are to be kept at the office of the clerk, as provided by the section.

Section 483.070, supra, authorizes the clerk to remove the

Honorable Richard E. McFadin

records, papers and other things appertaining to his office, to a more secure place when there is danger from an invading enemy, and then only for the duration of such danger. After the danger has ended, the clerk shall return said records, books and papers to his office.

Therefore, the circuit clerk cannot remove old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal from his office and store them elsewhere, in order to provide space for more current records in his office. By this statement we do not mean to infer that further consideration, of any methods by which the old records may be taken from their present location and stored in some other location is precluded. Such a meaning was never intended, and it is our purpose to discuss a method during the remainder of this opinion by which the desired results implied by your inquiry may be legally accomplished. We shall attempt to show that such old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal may be taken from their present location in the clerk's office and stored, without removing them from said office, in order to make space available for more current records.

In this connection it is necessary to consider what is meant by an "office" and particularly as the definition applies to the "office" of the circuit clerk.

Webster's New International Dictionary, 2nd Edition, defines the word "office" to be:

"The place where a particular kind of business or service for others is transacted; a house, room, or apartment in which public officers and others transact business; the building, room or department in which the clerical work of an establishment is done; a countinghouse; the room, etc., in which business or work of some particular department of a large concern or institution is carried on or from which it is directed as, the register's office; a lawyer's office; the office of a school or hospital; freight office."

In the case of *Bigham v. State*, 20 SW 577, the Criminal Court of Appeals of Texas, reviewed the case in which the defendant was convicted of burglarizing the sheriff's office. Among other matters before the court was the specific objection that the indictment did not charge a house had been burglarized and was totally defective in not using the precise words of the statute and in alleging the

Honorable Richard E. McFadin

sheriff's "office" was a house. In discussing the objection, and in overruling same the court said at l.c. 577:

"An 'office' as defined by Webster is 'a house or apartment in which public officers and others transact business; as a register's office, a lawyer's office.' A 'vault' by the same authority is 'a cellar'. The indictment alleges the breaking and entry into the sheriff's office, and also into the vault situated in said office *** we think the place described in the indictment as being burglarized was necessarily a 'house' as defined in the Code."

From the foregoing definition of the word "office" as related to our present discussion, it is apparent that the office of the clerk of the circuit court is a place where the clerk may ordinarily be found during business hours, where he keeps his official records, performs certain statutory duties and provides certain services for those of the general public legally entitled to same.

No Missouri statutes provide that the clerk's office shall be located in a certain building or buildings and shall consist of a certain number of rooms with a total floor space of a given number of square feet. The only statutory restriction as to the location of the clerk's office is that found in Section 483.065 supra, requiring the clerk to keep his office at such place or places as the court may direct "not more than two hundred yards from the courthouse or permanent place of holding court of which he is clerk."

In the absence of any statutory prohibition, the circuit clerk's office may consist of one or more rooms, as the necessity of each individual case may require. If more than one room is used for the clerk's office, such rooms are not required to be connected or to be located on the same floor or part of the same building. While an arrangement of this kind might be impractical, or inconvenient, the office rooms may be disconnected, located on the same or different floors, in the same or different parts of one building, or some rooms may be located in one building and some in another, so long as each room is within the statutory distance from the circuit court room.

If the office of the circuit clerk of your county consists of more than one room, and each room is located not more than two

Honorable Richard E. McFadin

hundred yards from the room in which circuit court is usually held, and each room is one to which the clerk has exclusive access and control and it is not used jointly with any other county official, it is our thought that the clerk may take the old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal mentioned above, from the places in which they are kept in the clerk's office and store them in another location in the same office, in order to provide available space for more current records.

This procedure might serve to accomplish the desired results, and would be proper under the circumstances. None of the old records would be removed from the office, and such procedure would not constitute a violation of Sections 483.065 and 483.070, supra. However, care must be taken to store the records in a place conveniently located, and where they will be as readily available to the public as the place from which they were taken.

CONCLUSION

Therefore, it is the opinion of this office that old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal are records, papers and property, belonging to the office of the clerk of the circuit court, which shall be kept at the clerk's office, within the meaning of Section 483.065, RSMo 1949, and which cannot be removed therefrom, except in case of danger from an invading enemy, as provided by Section 483.070, RSMo 1949.

It is further the opinion of this office, that for the purpose of providing additional space for more current records, the circuit clerk may remove said old circuit court witness books, minute books, transcripts of judgments and transcripts on appeal from their usual places in his office and store them in another room in the same office if the right of access to and control over said office storage room is in circuit clerk only, and such room is not used jointly by the circuit clerk and other county officials, without violating the provisions of Sections 483.065 and 483.070, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

PNC:vm

STATE FEDERAL SOLDIERS' HOME: Section 212.120 RSMo 1959 does not have authority to board of trustees of Soldiers' Home of St. James, Missouri, sell any portion of land contained in original conveyance to said board of trustees for a site for said institution in 1897, and any sale thereof may not be made without specific legislative authority reflected by statutory enactment.

May 16, 1961



Mr. Marvin H. McDaniel, Superintendent
State Federal Soldiers' Home of Missouri
St. James, Missouri

Dear Mr. McDaniel:

This opinion is rendered in reply to your inquiry reading as follows:

"We wish to request an opinion concerning Chapter 212, Soldiers' Home, Missouri Revised Statutes 1959, Section 212.120 Board to hold and convey certain property - limitations.

"Under this section does the Board of Trustees of the State Federal Soldiers' Home have the authority with the approval of the Governor to sell a portion of the institution's land to use these funds from the sale of the land for the re-appropriation for the benefit of the institution."

Supplementing your original inquiry you have informed this office that the land which is the subject of your inquiry "was acquired as part of the original site of the Home in 1897".

Authority of the board of trustees of the Federal Soldiers' Home at St. James to take, hold and convey property is found in the following language from Section 212.120 RSMo 1959:

"The board of trustees may receive any grant or devise of land, or any gift or bequest of money or other personal property to the Federal Soldiers' Home, at St. James, as an endowment of the Federal Soldiers' Home at St. James, thereby vesting title to any such property in the state

Mr. Marvin H. McDaniel

of Missouri for the sole use and benefit of the home. The board of trustees may sell, convey, or otherwise convert into money any such property for the use and benefit of the home, however, any such sale, conveyance or conversion shall be first approved by the governor of the state of Missouri."

The language of Section 212.120 RSMo 1959 clearly discloses that the grants or devises of land, or any gifts, or bequests of money or other personal property, which the board of trustees is authorized to receive, are to be received "as an endowment". The power given to convert any such endowment into money by sale and conveyance must necessarily be restricted to that which was received as an endowment. If this restrictive view of the language is not taken we necessarily enlarge the statute so as to make possible the extinguishment of the original site of the home which was acquired by purchase and not by gift or donation. In *Mississippi Valley Trust Co. v. Ruhland*, 359 Mo. 616, 1.c. 621, 222 S.W. 2d 750, we find this brief language disclosing how the original site for the Federal Soldiers' Home at St. James was acquired:

"By an Act approved March 1, 1897 (Laws 1897, pp. 28-30, §§ 1-6, now §§ 15136-15141), the appointment of a Board of Trustees was authorized for the establishment and maintenance of a home for Federal soldiers and sailors and army nurses, and the aged wives of such soldiers and sailors (§1); and said Board of Trustees was authorized 'to receive for a nominal consideration' from 'Woman's Relief Corps Soldiers' Home' a conveyance of the property known as the Soldiers' Home at St. James, Missouri, 'vesting the title to said property in the State of Missouri' (§3)."

It is also significant that the power to convey or dispose of property now vested in the board of trustees under Section 212.120 RSMo 1959, was not placed in the statute until its amendment in 1945 (A.L. 1945 p. 1758), and the grant of such power is in no way germane to the original grant. The purpose of the 1945 amendment to what is now Section 212.120 RSMo 1959,

Mr. Marvin H. McDaniel

is reflected in the following language from Mississippi Valley Trust Co. v. Ruhland, supra, 1.c. 359 Mo. 623, 624:

"In connection with the receipt of said gift and the sale of the interest of said Home in real estate constituting a part thereof, the office of the Attorney General of Missouri was of the opinion the Board of Trustees of said Home did not have legal capacity to accept said testamentary gift and dispose of said interest in said real estate, and recommended the passage of legislation vesting designated officials with such authority. Thereafter, § 15138, supra, was amended (Laws 1945, p. 1758) and said Board of Trustees was expressly 'authorized and directed to receive any grant or devise of land, or any gift or bequest of money or other personal property to the Federal Soldiers' Home, at St. James, Missouri, as an endowment of the said Federal Soldiers' Home, at St. James, Missouri, thereby vesting title to any such property in the State of Missouri for the sole use and benefit of said Home.' This amendment, as well as other similar enactments with respect to other State agencies, was in affirmance of the common law, as developed hereinbefore; and so far as the capacity of the State to accept testamentary gifts is involved, was declaratory thereof and the more clearly established the common law as being in force and effect."

In the absence of legislative authorization the property in question, being a part of the original site for the Federal Soldiers' Home at St. James, Missouri, may not be sold under the rule reflected in the following language from 81 C.J.S., States, Section 107:

"The power to dispose of state property is vested in the legislature which may make provision therefor by statute, and may regulate or change at any time the

Mr. Marvin H. McDaniel

method of disposition; and the statutory provisions must be complied with or the sale will be void."

CONCLUSION

It is the opinion of this office that Section 212.120 RSMo 1959 does not grant authority to the board of trustees of the Federal Soldiers' Home at St. James, Missouri to sell any portion of land contained in the original conveyance to said board of trustees for a site for said institution in 1897, and any sale thereof may not be made without specific legislative authority reflected by statutory enactment.

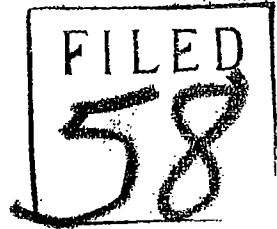
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JLO'H:aa

September 15, 1961



Honorable Richard E. McFadin
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. McFadin:

This is in response to your letter dated July 28, 1961, in which you request an opinion from this office.

In your letter you ask the question of whether the city attorney of a third class city operating under the city manager form of government is required to be a resident of said city.

Briefly, the answer to this inquiry is in the affirmative. As you well know, these statutory provisions relating to the city manager form of government are found within Sections 78.430 through 78.640, RSMo 1959. Section 78.440 states that Chapter 77 (which relates to third class cities) shall govern unless there is an inconsistency within the applicable provisions of Chapter 78. So, then, in Section 77.370 it designates the city attorney as an "officer" and in Section 77.380 it states that officers except city sextons must be a resident of the city.

Therefore, it is the opinion of this office that the combined reading of the relative sections in Chapters 77 and 78 reaches the conclusion that a city attorney of a third class city operating under a city manager form of government is required to be a resident of the city.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

EB:BJ

November 10, 1961



Honorable T. D. McNeal
State Senator
2906A Union Blvd.
St. Louis 15, Missouri

Dear Senator McNeal:

In your letter of November 3, 1961, you ask the opinion of this office with reference to the following question:

"Does Section 4 contemplate or require that petitions signed by voters in the School Districts involved be submitted to the Boards of Election Commissioners for clearance or approval before the sponsors of such a project take the matter up with the State Department of Education?"

Section 4 of Senate Committee Substitute for Senate Bill No. 7 (Section 165.800 RSMo, Laws 1961, p. _____) provides in part that "the election shall be conducted in the manner provided under school law". We can find no provisions in the school laws governing cities of over 700,000 inhabitants or in other school laws which require petitions to be submitted to the board of election commissioners. We can find no such requirement in the junior college district act. The junior college district act requires these petitions to be presented to the State Board of Education.

For these reasons it is our opinion that the petitions for the formation of a junior college district do not have to be submitted to the boards of election commissioners for clearance or approval. Rather these petitions should be presented to the State Board of Education.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

ROAD DISTRICTS: Attorney employed by private citizens for
SPECIAL ROAD DISTRICTS: purpose of advocating disincorporation of
ROADS AND BRIDGES: a road district may not be paid from funds
ATTORNEYS: of district.

November 17, 1961

Honorable Paul McGhee
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri



Dear Sir:

We have your letter of recent date, which letter reads:

"Stoddard County is of the third class and has township organization. In 1948 the 'Bernie Special Road District of Stoddard County, Missouri' was organized pursuant to Section 233.320 et. seq. RSMo.

"In 1961, pursuant to Section 233.425 et. seq. a number of land owners residing within the district filed in the County Court a petition for dissolution of the district. On April 10, 1961, after notice and several hearings, the County Court entered its order dissolving the district, and appointed a trustee to take charge of the affairs of the district.

"The petitioners had caused an attorney to prepare the petition and appear before the County Court to advocate the dissolution of the district. The attorney submitted to the trustee a claim for \$250.00 as his fee for services rendered by him in bringing about the dissolution of the district. The trustee found the amount of the fee to be reasonable, but refused payment upon the ground that it was not a valid claim against the assets of the district. The attorney has now demanded payment from the County Court.

Honorable Paul McGhee

"Neither the County Court nor the officials of the district employed the attorney.

"I request your opinion as to whether the attorney is entitled to receive payment for his services from the assets of the district or any other public money."

The statute under which the petition was filed and the road district dissolved is Section 233.425, RSMo 1959, which reads as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land owned by residents of the county residing within the district organized under the provisions of sections 233.320 and 233.445, shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced, to disincorporate such road district. No such road district shall be disincorporated until notice is published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

Subsequent to the dissolution of the district, the county court obviously appointed a trustee as required by Section 233.435, RSMo 1959. The duties of such a trustee are set out in Sections 233.440 and 233.445, RSMo 1959, which provide:

Section 233.440:

"The trustee shall have power to prosecute and defend to final judgment all suits instituted by or against the road district, collect all money due the same, liquidate all lawful demands against the same, and for that purpose shall sell any property belonging to such road district or so much

thereof as may be necessary, and generally to do all acts requisite to bring to a speedy close all the affairs of the road district, and for that purpose, under the order and direction of the county court, to exercise all the powers given by law to said road district."

Section 233.445:

"When the trustee shall have closed the affairs of the road district, and shall have paid all debts due by said road district, he shall pay over to the county treasurer all money remaining in his hands, and take receipt therefor, and deliver to the clerk of such county court all books, papers, records and deeds belonging to the dissolved road district."

The attorney asserting the claim against the road district's funds compiled a list of authorities in support of the claim, which list was received with your letter. Without analyzing each herein, suffice it to say we do not believe that those authorities are determinative of this question. The cases and texts cited in support of the claim relate to private funds held in actual or constructive trust for the persons who received the claimed benefits of the attorney's unsolicited services.

Although there is no Missouri case law on this problem, we believe sound public policy should prohibit the dissipation of road district funds to support the litigation of private parties, regardless of the outcome. We do not believe that the resolution of the instant problem can turn on the finding of the county court that the dissolution of the district will advance the public good. Although Section 233.295, RSMo 1959, requires such a finding by the county court as a prerequisite to an order of disincorporation, there is always a presumption that whenever a county court acts it is for the "public good."

We might also observe that the "public good" in a particular situation may bear no relationship to what is in the best interest of an individual landowner in the district. Disincorporation of a road district may in fact work to the

detriment of such a person; and it cannot be reasonably contended that he should be required under such circumstances, to pay for the advancing of the public good as distinguished from his personal good.

Even if the theory that those who receive a common benefit from the labors of an attorney should share the burden of his fee could be invoked here (as the claimant-attorney apparently is urging), it is submitted that payment out of road district funds of the attorney's fees would not be authorized. The rule running through the cases cited by the claimant is expressed clearly in *St. Louis Union Trust Co. v. Fitch* (Mo. Sup. 1945), 190 SW2d 215, 217, where the court said:

"On the merits respondent contends 'that a fund which has been increased or protected by the services of an attorney should bear the expenses of allowance of his fees'.

"This is admitted to be the rule announced in the cited cases. Assuming, but not ruling that respondent was an attorney for the trust estate in the mandamus cases, it appears that his services in said cases neither increased nor protected the fund. It follows that said cases are not in point."

Applying that rule to the instant problem, it is obvious that the funds of the road district were neither increased nor protected by the dissolution of the district. Under the provisions of Section 233.300, RSMo 1959, dissolution has no effect upon "any right accruing to such road district or to any person," nor does dissolution "invalidate or affect any contract entered into or imposed on . . ." the district.

There is no statutory authorization for the payment of attorney fees by a county court or by its appointed trustee upon dissolution of a road district. Absent such authorization, to permit such payment would require us to accord to county courts judicial powers such as are exercised by a court of equity in awarding an attorney fee out of a fund. That county courts enjoy only those powers given them by statute and do not share in the judicial power of the state is clearly set out in the cases on this subject.

Honorable Paul McGhee

In the case *In Re City of Kinloch* (Mo. Sup. 1951) 242 SW2d 1959, our Supreme Court stated that the judicial pronouncements concerning county courts subsequent to the Constitution of 1945 make clear the fact that, l.c. 64, "county courts now can have no authority to determine matters comprehending judicial action in the exercise of 'the judicial power of the state'." At page 63, the Court said:

"* * * The constitutional meaning of 'judicial power of the state' does not contemplate every exercise of duties judicial in nature, but refers to such powers and authority as courts and judges exercise; such as legitimately pertain to an officer in the department designated by the Constitution as 'judicial'; such as are exercised in the ordinary forms of a court of justice, in a suit between parties, with process. *State ex rel. School District No. 1 v. Andrae*, 216 Mo. 617, 116 S.W. 561. Many administrative and quasi judicial bodies, as a part of their delegated duties, must hear and determine facts in order to ascertain what action the law imposes upon them. In this respect such bodies are performing duties judicial in nature. But an administrative body or even a quasi judicial body is not and cannot be a court in a constitutional sense. * * *

Thus, since no positive authority exists which would permit the payment and since no authority may be inferred from the nature of the county court or its appointed trustee, it follows that the requested attorney fee may not be paid by the county or the trustee.

CONCLUSION

It is therefore the opinion of this office that an attorney who is employed by private citizens for the purpose of petitioning the county court for the dissolution of a road district may not, upon dissolution of the district, properly receive his fees from the funds of the district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

COUNTIES:

Section 137.177, R.S. Mo, Amm 1957, adopted by a class three county ceases to be in force and effect when the county becomes a class two county.

March 7, 1961



Honorable William B. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Milfelt:

In your letter of February 7, 1961, you request an opinion from this office on a question you submit as follows:

"County Court has submitted the question to this office pertaining to Jefferson County which as of January 1, 1961, obtained the legal status of a second class county, which question is as follows:

"Can Jefferson County still require people to obtain building permits as a second class county since they no longer fall within the provisions of Section 137.177 of the Revised Statutes of Missouri as amended by the session laws of 1957 and since they have not adopted or put into effect by provisions of Section 64.510 of the Revised Statutes of Missouri as amended by the session laws of 1957 pertaining to planning and zoning of second and third class counties?"

Section 137.177, R.S.Mo., Amm 1957, Laws of Missouri, 1957, H.B. 300, provides in part as follows:

"2. (1) The county court in counties of class three adjoining a county of the first class may upon petition of at least fifteen per cent of the of the voters voting in the last general election, by order duly made of record, require that before



any person shall erect or construct any building, the cost of which exceeds six hundred dollars, upon any lands lying and situate outside the corporate limits of any incorporated city in such counties he shall first file an application for a building permit with the county clerk of such county, which said application shall describe by metes and bounds the lands upon which the erection or construction of a building or buildings proposed and a general description of the building or buildings to be constructed or erected thereon."

"3. Upon receipt of such application the county clerk of such county shall immediately prepare a building permit in the customary form and shall issue the same to the applicant upon payment by the applicant of the building permit fee of one dollar.

"4. The county clerk of such counties shall keep a true and accurate record of the building permits so issued and shall, on the first day of January and the first day of July of each year, deliver to the county assessor a list of all building permits issued for the previous six-month period.

"5. Any person who shall construct or erect, or attempt to construct or erect any building in such county without first securing a building permit as provided in this section shall be guilty of a misdemeanor."

It is apparent from reading the above section that its purpose is to aid the county assessor in making an assessment of new construction in the county for tax purposes and it should not be classed as a planning or zoning law.

Apparently when the provisions of Section 137.177 supra, were adopted by the county court, Jefferson County was a class three county. Since you state Jefferson County obtained the status of a second class county as of January 1, 1961, the question arises whether the provisions of Section 137.177, supra, apply and can be enforced in the future in said county.

It is our view that Jefferson County cannot in the future require an application for a building permit to be filed with the county clerk under Section 137.177, supra. Since Jefferson County is no longer a third class county it follows that Section 137.177, supra, no longer applies.

Honorable William B. Milfelt

The provisions of Section 64.510, V.A.M.S., Pocket Parts, Laws of Missouri, 1951, p. 406, as amended, Laws 1957, p. 321, which provide for planning and zoning in class two and three counties is not in effect in Jefferson County because as you state, it has not been adopted by the county.

The county court has no authority to require building permits except that expressly granted under the above statutory provisions.

CONCLUSION

It is the opinion of this office that the provisions of Section 137.177, supra, which were adopted by a class three county cease to be valid and in force or effect for building permits in the future when the county became a class two county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Moody Mansur.

Yours very truly,

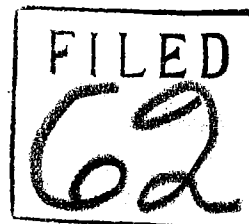
THOMAS F. EAGLETON
Attorney General

MM:ms

OFFICERS:
CIRCUIT CLERKS:
COMPENSATION:
TERM OF OFFICE:
CONSTITUTIONAL LAW:

A person elected to fill an unexpired portion of the term of a circuit clerk is not entitled to an increase in compensation pursuant to a statute enacted during the term of office but before his election thereto. The increase does not become effective until the expiration of such term.

May 26, 1961



Honorable William W. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Milfelt:

Under date of April 28, 1961, you requested an opinion as follows:

"The Circuit Clerk of this County died shortly after taking office in January, 1959. D. J. Mahn was appointed Circuit Clerk following the death of Mr. Arch Vreeland. In the past election in 1960, Mr. J. Bryan Jones was elected to fill the unexpired term of Mr. Arch Vreeland.

"Also in 1960 we became a second class county.

"The question now involved is this, is Mr. J. Bryan Jones a hold over officer within the meaning of the statute which would prohibit him from being entitled to the increase under Section 483.315 as amended by the Session Laws of 1959, Senate Bill No. 196 Section 1.

"We would appreciate an early reply so that his salary might be straightened out with the least personal inconvenience to himself and the County Court."

Section 13, Article VII of the Constitution of Missouri provides as follows:

Honorable William W. Milfelt

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This section clearly and unambiguously prohibits any increase in the compensation of an officer "during the term of office."

In *Smith v. Pettis County*, 345 Mo. 839, 136 SW 2d 282 it is held; "'A term of office' uniformly designates a fixed and definite period of time." Section 483.015, RSMo 1959, fixes the term of office of circuit clerks at four years, commencing on the first Monday in January next ensuing their election. Thus, by statute the term of office of circuit clerk is the fixed and definite period of four years.

Section 483.020, RSMo 1959, provides that when any vacancy shall occur in the office of any clerk so elected, the Governor shall fill such vacancy by appointing some eligible person who shall serve until next general election "at which time a clerk shall be chosen for the remainder of the term." This statute clearly indicates that the length of the term is unaffected by the vacancy, and that in the event of such vacancy, the successor is chosen for the same term but only for the unexpired portion thereof.

In addition to the foregoing special statute applicable to clerks alone, there is a somewhat similar general statute which pertains to filling vacancies in any state or county office with certain exceptions not here relevant, namely Section 105.030, RSMo 1959. This statute also provides for an interim appointment by the Governor followed by the election of a person "to fill the unexpired portion of the term".

In *Thornberry v. City of Campbell*, 274 SW 847, the court had for construction a statute providing that an officer's salary shall not be changed "during the time for which he was elected or appointed." A city marshal who had been elected to the office resigned and the question presented was whether or not his successor was affected by an ordinance passed prior to the resignation but after the term commenced, which decreased the amount of compensation payable. The court held that such change could not become operative "until the term of office fixed by statute has expired, whether the person occupying the office at the beginning of the fixed term continues in office or not." The court held as follows:

"But the term is fixed and the statute prohibiting a change in compensation is

Honorable William W. Milfelt

not, in our opinion, personal to the then occupant of the office, but applies to any subsequent holder of the office during the same term."

We believe that the constitutional provision quoted above is even more explicit than was the statute construed in the Thornberry case.

In *State ex rel Emmons v. Farmer*, 271 Mo. 306, 196 S.W. 1106, the court construed the provision of the 1875 Constitution prohibiting increases in compensation of an officer during "his" term of office as referring to the term fixed by statute and not to the individual who happened to be the incumbent. That case involved an officer who had been reelected to a second term. The court ruled as follows:

"* * * Each official term stands by itself. The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term. * * *"

It is significant that the phraseology of the constitutional provision has been changed. Section 8, Article XIV of the Constitution of 1875 prohibited any increase in compensation of an officer during "his" term of office. The 1945 constitution prohibits the increase during "the" term of office. It would appear that the intent of this change was to avoid any possibility that our courts (as have the courts of some states) might construe the constitutional provision as applying to the person filling the office rather than to the term of office, irrespective of how many persons might hold such office during the fixed term.

The term of office of the Circuit Clerk is fixed by statute at four years. In our opinion, no law providing for an increase in compensation, effective after the commencement of said term, may validly apply to any incumbent who holds such office during any portion of such term.

CONCLUSION

It is the opinion of this office that the increase in compensation provided for by Section 483.315, RSMo 1959, does not become effective until the expiration of the term of office

Honorable William W. Milfelt

to which the original incumbent was elected; and that a person elected to fill the unexpired portion of such term is not entitled to any increase in compensation pursuant to a statute enacted during the term of office but before his election thereto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

COUNTIES:
COUNTY AUDITORS:
AUDITORS:

The auditor of Jefferson County, appointed January 1, 1961, is filling out an unexpired term of office, and is not, therefore, entitled to the increased compensation authorized by Laws 1959, S. B. 196, Section 1 (Now Section 55.090, RSMo 1959).

June 30, 1961



Honorable William B. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Milfelt:

This office is in receipt of your opinion request, which reads as follows:

"An opinion is requested from your office reference compensation for the Auditor of Jefferson County, which is now a County of the Second Class. The facts are as follows:

Jefferson County was established as a second Class County on January 1, 1961. At that time, after being duly appointed and commissioned by the Governor, our auditor took office and has been receiving a base salary of \$5000.00 per annum plus \$1000.00 compensation for additional duties as authorized by statute.

"The issue now proposed is whether his base pay should be \$4000.00 or \$5000.00. Another way of proposing the issue herein is whether the auditor commences a new term at the time the county commences to be of Second Class designation or is he taking office in the middle of the designated term for auditors of Class Two Counties as outlined in Section 55.050, Missouri Revised Statutes 1959. If the latter is correct, then his base pay

should be \$4000.00 as he would be taking office in the middle of a term.

"An early reply on this inquiry will be appreciated so that the auditor and the County Court will not be too much inconvenienced over any possible salary adjustment.

Section 55.050, RSMo 1959, reads as follows:

"At the general election in the year 1946, and every four years thereafter, a county auditor shall be elected in each county of the second class. He shall be commissioned by the governor and shall enter upon the discharge of his duties on the first Monday in January next ensuing his election. He shall hold his office for the term of four years and until his successor is duly elected and qualified, unless he is sooner removed from office. If a vacancy occurs in the office by death, resignation, removal, refusal to act, or otherwise, the governor shall fill the vacancy by appointing some eligible person to the office, who shall discharge the duties thereof until the next general election, at which time an auditor shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Section 55.090, RSMo 1959, provides:

"The county auditor, in counties of the second class, shall receive as compensation for his services an annual salary of five thousand dollars."

This section prior to 1959, read:

"The county auditor, in counties of the second class, shall receive as compensation for his services, a salary of four thousand dollars per annum, payable monthly in equal installments out of the general revenue fund of the county, by warrants drawn upon the county treasurer."

The change in the amount of compensation for auditors of second class counties was effected by Laws 1959, S.B. No. 196, Section 1.

Section 13, Article VII of the Constitution of Missouri provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

All auditors of second class counties in existence at the time S.B. 196 became law were last elected in 1958; their term began on the first Monday in January, 1959. Due to the above quoted constitutional provision, they cannot receive the increased compensation authorized by S.B. 196 during their present term.

As stated in your request, Jefferson County became a second class county (and therefore entitled to an auditor) on January 1, 1961. Also, on January 1, 1961, the auditor of Jefferson County took office, having been appointed and commissioned by the Governor. Prior to this time, Jefferson County, being neither a county of the first or second class, was not entitled to an auditor.

The question, therefore, becomes: Is the auditor of Jefferson County filling out an unexpired term coinciding with the terms of all other county auditors of second class counties in Missouri, and therefore not entitled to the compensation increase, or is such auditor serving a short term, from January 1, 1961, until his successor assumes office on the first Monday in January, 1963, and therefore entitled to the compensation increase, since such term commences after the enactment of S.B. 196. (Now Sec. 55.090 RSMo 1959)? It is the opinion of this office that the first alternative is correct. To adopt the other alternative would be to construe the present Section 55.090, RSMo 1959, as providing that the County Auditor of Jefferson County is entitled to more compensation than all other auditors of second class counties in Missouri during their present terms. Such a construction, we believe would render this section unconstitutional in view of Section 11, Article VI of the Constitution of Missouri, which provides as follows:

"Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of counties. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law."

CONCLUSION

The auditor of Jefferson County, appointed January 1, 1961, is filling out an unexpired term of office, and is not, therefore

entitled to the increased compensation authorized by Laws 1959,
S. B. 196, Section 1. (Now Section 55.090, RSMo 1959).

The foregoing opinion, which I hereby approve, was prepared
by my assistant Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HE:ms

COUNTY COURTS:
COUNTY CLERK:
COUNTY AUDITOR:

1. A valid contract executed by a county court is valid and binding on the succeeding court.
2. A county clerk is not entitled to any extra compensation for performing additional duties imposed upon him by law in conducting and supervising the registration of voters.
3. A county auditor in a third class county is not personally liable unless he makes an erroneous certification.

December 28, 1961

Honorable William B. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

FILED
62

Dear Mr. Milfelt:

In your letter of October 9, 1961, you enclosed a copy of a statement submitted by Wallace V. Coleman, County Clerk, for services rendered to Jefferson County. You further enclosed a copy of a letter dated October 6, 1961, directed to you from William Rasmussen, Auditor of Jefferson County, and request an opinion from this office on the matter submitted, which letter is as follows:

"Will you advise or direct me whether or not my office (Auditor of Jefferson County) is under legal duty to approve or certify payment of the attached bill? This bill has been approved by two members of the County Court.

"I feel that several legal questions are involved concerning the nature of this bill:

"1. Does the old 1960 County Court of a 3rd Class County have the power to determine procedure or policy for a new 2nd Class County before the change in status of said county.

"2. How shall the County Clerk ex officio Registration Officer be compensated for his duties? Is it by salary, by fees, or by his rendering bills for services performed.

Honorable William B. Milfelt

"3. Is the County Auditor liable in anyway or circumstance for any obligation incurred by a county officer and approved for payment by the County Court; when the officer did not ask the auditor to certify that there is sufficient cash balances to pay the warrant? I refer to RS Mo. 1959 50:650."

In the first question submitted in Mr. Rasmussen's letter, inquiry is made whether the county court of a third class county has the power to determine procedure in policy for a new second class county before the change of status of said county becomes effective. We assume from the information you submit that "policy or procedure" you refer to concerns the validity of contracts executed by the county court in 1960 prior to the change in classification of said county, and whether such contracts would be binding on the succeeding county court of the county after the change of classification has been accomplished.

In *Aslin vs. Stoddard County*, 106 S.W. 2d 474, the county court entered into a written contract on December 31, 1932, with plaintiff to serve as janitor of the courthouse for the year of 1933. On January 1, 1933, a new county court, composed of two new judges, assumed office and thereafter refused to honor said contract. In holding the contract made by the old county court valid and binding on the new county court, the appellate court stated, l.c. 474 and 476:

"[1] I. By statute, sections 2072 and 2073, R.S. 1929, Mo.St.Ann. §§ 2072, 2073, pp. 2656, 2657, the county court is composed of three members, styled judges, one of whom, by statute, the presiding judge, is elected by the county at large for a term of four years, the other two being elected by districts, for a term of two years, the terms of all continuing until their successors are elected and qualified. In the instant case the terms of the two 'district' judges expired December 31, 1932, if their successors, elected at the November, 1932, election qualified promptly. The presiding judge held over. The county court is a court of record, having certain judicial functions. It also has many

Honorable William B. Milfelt

administrative duties in connection with the care and management of county property and funds, school funds, highways, etc., and the business affairs of the county generally. When new or different district judges are elected and qualify, no 'reorganization' of the court is required. The presiding judge continues to be such. If he is replaced by another, his successor becomes, by operation of law, presiding judge. In view of the constitutional and statutory provisions creating county courts and prescribing their functions and duties, it is clear that the county court is a continuing body--not a succession of different boards or 'courts.'"

* * * * *

"The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs."

We believe that under the ruling of the above cited case that a contract otherwise valid executed by a county court is binding on the succeeding county court, providing the contract is made in good faith, without fraud, and is limited to a reasonable time. The fact that the classification of the county may have changed from class three to class two would not alter or change this situation.

Honorable William B. Milfelt

In the second question submitted it is inquired how the county clerk, an ex officio registration officer, shall be compensated for his duties. We assume from the other information you have submitted that the duties you refer to are the duties of the county clerk that are required to be performed by him under Chapter 114, RSMo 1959, regarding the registration of voters in the county at large.

Chapter 114, RSMo 1959, provides for local option county registration of voters. Section 114.080 provides:

"1. The county clerk is ex officio the registration officer of the county and has full charge and control of the registration of voters in the county.

"2. The county clerk's office is open for permanent registration at all times the office is open for other business, except the office is not open on Sundays and holidays. Registration shall be held at the office of the county clerk within the hours which said office is ordinarily open."

Section 114.090 provides:

"For the initial registration, the county clerk may designate additional places of registry in the county, but these places of registry shall not exceed more than one in each township in the county in addition to the office of the clerk of any city, town or village who is deputized by the county clerk under this chapter. If any additional place of registry is established, the county clerk shall place a deputy in charge thereof."

Section 114.080, supra, requires the county clerk to have full charge and control of the registration of voters in the county. There is no statutory provision allowing him any compensation for the additional duties placed upon him under this chapter. This section also provides that the county clerk's office is open for permanent registration at all times during his regular office hours except on Sundays and holidays.

Section 114.090, supra, provides that the county clerk may designate additional places for the initial registration in the county, but that the places of registry shall not exceed more than one in each township in the county in addi-

Honorable William B. Milfelt

tion to the office of the clerk of any city, town or village who may be deputized by the county clerk.

Under this section it is the duty of the county clerk to designate any additional places for registration of voters on the initial registration, but such additional places cannot exceed one in each township and the office of the city clerk in any city, town or village.

Section 114.100 provides for the appointment by the county clerk of deputies to help perform the duties required under Chapter 114. It also provides for them to be compensated for their services.

In *State ex rel Forsee vs. Cowan*, 284 S.W. 2d 478, 1.c. 481, the court states:

"The law in Missouri is well established 'that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. *Gammon v. Lafayette County*, 76 Mo. 675; *State ex rel. Evans v. Gordon*, 245 Mo. 12, 149 S.W. 638; *Sanderson v. Pike County*, 195 Mo. 598, 93 S.W. 942; *Jackson County v. Stone*, 168 Mo. 577, 68 S.W. 926; *State ex rel. Troll v. Brown*, 146 Mo. 401, 47 S.W. 504; *Bates v. City of St. Louis*, 153 Mo. 18, 54 S.W. 439, 77 Am.St.Rep. 701; *Williams v. Chariton County*, 85 Mo. 645. * * * 'Maxwell v. Andrew County, 347 Mo. 156, 146 S.W. 2d 621, 625. 'In so far as concerns compensation for services, there is a very imperfect analogy between services rendered by a public officer and those rendered by one individual to another in a private capacity. The law implies in the latter case a promise to pay as much money as the services are reasonably worth, whereas, the compensation for services of a public officer is in most cases fixed by positive law. If the fixed compensation is more than the service is worth, the public or

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party must pay it; if less, the officer must be content with it." 43 Am. Jur., sec. 362, p. 150.' Alexander v. Stoddard County, Mo.Sup., 210 S.W. 2d 107, 109. See also State ex rel. Harrison v. Patterson, 152 Mo.App. 264, 132 S.W. 1183.

* * * * *

"Now, the law is also clear that '[e]ven in the absence of statutory prohibition and even though the work or services consist of "extra services," if they are in point of fact a part of or germane to the official duties of his office, the officer's employment, for obvious reasons, is against public policy and he is not entitled to compensation for performing the services. Annotations 84 A.L.R. 936; 159 A.L.R. 606.' Polk Tp., Sullivan County v. Spencer, Mo.Sup., 259 S.W. 2d 804, 805. See also Tyrrell v. Mayor, etc., of City of New York, 159 N.Y. 239, 53 N.E. 1111, 1112; 43 Am.Jur., 'Public Officers', § 363, p. 151."

In Ward vs. Christian County, 111 S.W. 2d 182, 1.c. 183, the court stated:

"It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed." * * *

We believe these cases are authority for holding that a county clerk is not entitled to any extra compensation for performing the additional statutory duties that are required of him in registering and supervising the registration of voters under Chapter 114.

In the third question submitted inquiry is made whether the county auditor is liable for an obligation incurred by a county officer and approved for payment by a county court without the auditor certifying there is sufficient cash balance to pay the warrant when presented. Reference is made to Section 50.650, RSMo 1959. This section provides:

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"The accounting officer is personally liable on his bond for the amount of any obligation incurred by his erroneous certification as to the sufficiency of an appropriation or of a cash balance, or for any warrant drawn when there is not a sufficient amount unencumbered in the appropriation or a sufficient unencumbered cash balance in the fund to pay the warrant, or for the payment of any amount not legally owed by the county. Any officer purchasing any supplies, materials or equipment is liable personally and on his bond for the amount of any obligation he incurs against the county without first securing the proper certificate from the accounting officer. The other officers, as the county court requires, shall each give surety bond in an amount fixed by order of the county court for the faithful performance of his duties and for a correct accounting for all moneys and other property in his custody. The sufficiency of the sureties shall be approved by the county court. Any premium on the bonds shall be paid by the county."

Section 50.530, RSMo 1959, defines an "accounting officer" as "county auditor" when used in the county budget law.

Under Section 50.650, supra, the county auditor is personally liable on his bond for any amount of obligation incurred by his erroneous certification as to the sufficiency of an appropriation or cash balance. Certainly he is not liable personally or on his bond unless he made a certification as to the sufficiency of the appropriation or cash balance. He is also liable for any warrant drawn where there is not a sufficient amount to pay the warrant or for any amount not legally owed by the county which he erroneously certifies. An erroneous certification must be made in each of these matters before the auditor would be personally liable. It follows that unless the auditor makes an erroneous certification he would not be personally liable or liable on his bond.

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CONCLUSION

In conclusion, it is our opinion that:

1. An otherwise valid contract executed by a county court in a third class county, is valid and binding on the succeeding county court provided the contract is made in good faith, without fraud, and is limited to a reasonable time, and that the change in classification of the county from third class to second class would not change this rule of law.

2. A county clerk is not entitled to any extra compensation for performing the duties imposed upon him in conducting and supervising the registration of voters under Chapter 114, RSNo 1959.

3. That a county auditor is not personally liable unless he makes an erroneous certification regarding a warrant or obligation incurred by the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:BJ

FLORIDA RESIDENT: Florida resident employed in State of Missouri
MOTOR VEHICLES: must register and license his motor vehicle
REGISTRATION: in Missouri in order to operate said motor
HIGHWAYS: vehicle on the highways of this state, while
so employed.

February 17, 1961



Honorable Charles P. Moll
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Moll:

This is in reply to your inquiry of January 27, 1961, regarding the status of a nonresident of Missouri charged with the violation of operating a motor vehicle on the highways of Missouri without Missouri State Auto Tags.

A summary of your information indicates this individual is a citizen of the State of Florida, domiciled therein, who is employed a maximum of eight months in Florida. Thereafter, for the remainder of the year he resides here in Missouri with his parents in an employed status; that at the time of his arrest his car carried duly effective license plates in the State of Florida.

The Missouri statute controlling this situation is Section 301.271, VAMS, which provides:

"1. Unless otherwise provided by duly executed agreements entered into pursuant to sections 301.271 to 301.279, a nonresident owner, owning any motor vehicle which has been duly registered for the current year in the state, District of Columbia, territory or possession of the United States, foreign country or other place of which the owner is a resident, and which at all times when operated in this state has displayed upon it the number plate issued for the vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without

Honorable Charles P. Moll

registering such vehicle or paying any such registration fee to this state; but the provisions of this subsection shall be operative to allow such owner to operate or permit the operation of such vehicle owned by a nonresident of this state only to the extent that under the laws of the state, District of Columbia, territory or possession of the United States, foreign country or other place of residence of the nonresident owner, substantially equivalent exemptions are granted to residents of Missouri for the operation of vehicles duly registered in Missouri.

"2. Unless otherwise provided by duly executed agreements entered into pursuant to sections 301.271 to 301.279, trailers registered in any jurisdiction may be operated in combination with any motor vehicle properly registered in accordance with sections 301.271 to 301.279."

This statute allows nonresidents of Missouri to operate their vehicles in this state without registering said vehicle or paying any such registration fee to the state, only to the extent that substantially equal exemptions are granted to Missouri residents for the operation of Missouri registered vehicles in said other state. Therefore, the immunity granted to the Florida resident in this situation is dependent upon the extent of exemption granted to a Missouri resident in Florida under the same circumstances.

Section 320.37 of the Florida Statutes, 1959, provides:

"The provisions of this chapter relative to registration and display of license number plates shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state; provided, that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory

Honorable Charles F. Moll

or federal district of his residence, relative to motor vehicles and the operation thereof, and shall conspicuously display his registration number as required thereby; but such exemption shall not apply to motor vehicles operated for hire."

Section 320.38 of the Florida Statutes, 1959, further provides:

"The provisions of the law authorizing the operation of motor vehicles over the highways of the state by nonresidents of this state, when such vehicles shall be duly registered or licensed under the laws of some other state or foreign country, shall not apply to any nonresident who shall accept employment or engage in any trade, profession or occupation in the state, or shall enter his children to be educated in the public schools of the state, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the state."

(Underlining supplied.)

Pursuant to Section 320.38 of the 1959 Florida Statutes, a Missouri resident who accepted employment in the State of Florida would not be exempt under the registering and licensing laws of Florida so as to enable him to operate his motor vehicle on the highways of Florida without registering and licensing his motor vehicle in Florida while so employed. If employed in Florida, he would be required to obtain Florida State Auto plates in order to drive on the highways of said state.

Since Section 301.271, VAMS, allows nonresidents of Missouri operating their motor vehicles in this state the same immunities and exemptions allowed to Missouri residents for the operation of Missouri registered and licensed vehicles in said other state, a Florida resident who is employed in

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Missouri must register and license his motor vehicle in Missouri in order to lawfully operate said motor vehicle on the highways of this State, during said employment.

CONCLUSION

A Florida resident employed in the State of Missouri must register and license his motor vehicle in Missouri in order to operate said motor vehicle on the highways of this state, while so employed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, G. W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD:vm

ROADS: Funds made available by the County Court and
SPECIAL ROAD DISTRICTS: funds from the county aid road fund (King Bill
KING BILL ROAD: Road Law) may be used to construct an approved
COUNTY AID ROAD FUND: road regardless of whether such road lies
wholly or in part in a special road district.

June 28, 1961



Honorable Charles P. Moll
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Moll:

This is in answer to your letter of February 24, 1961,
requesting an opinion of this office which reads in part as
follows:

"The Franklin County engineer has laid
out a king bill road, part of which, ap-
proximately a mile or so, is within a
special road district. I have been ap-
proached by the County Court with the
following question:

'Can a county of the third class
build a king bill road within the
boundary of a special road district
and use State Funds as part of the
cost of the construction of said
road?'"

By "King Bill Road", we assume you refer to a road con-
structed under a program of the county aid road fund under
the provisions of Section 231.440 to 231.500 RSMo 1959. In
answering your question we shall consider various sections
of that law.

Section 231.465 provides as follows:

"Township boards or special road dis-
tricts may agree and contract with the
county court in which such township or
road district lies for payment to the
county court of the money necessary to
provide the county court's contribution

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to any project as provided by sections 231.440 to 231.500. The funds required by such contract shall in all cases be deposited with the county court in a special fund prior to the commencement of the work."

Section 231.470 RSMo 1959 provides for the county court of each county to formulate and maintain a program for the improvement, construction or reconstruction and restoration of county roads, and provides that programs for construction, reconstruction or maintenance together with the plans, specifications and estimates for each project shall be submitted to the state highway commission for approval. Section 231.490 also requires approval of each project by the state highway commission.

The "county roads" referred to in Section 231.470 RSMo 1959 are defined in subsection 3 of Section 231.560 RSMo 1959 as follows:

"'County roads' as used in sections 231.440 to 231.500 means all public roads located within any county, except roads or highways constructed or maintained as state roads or highways, and except roads, streets, or highways in incorporated villages, towns, or cities."

Since the only specific exemptions contained within this definition of county roads are for state roads or highways and roads, streets, or highways in incorporated villages, towns, or cities, it necessarily follows that all other public roads located within a special road district are included in the definition of "county roads" as used in these sections concerning the county aid road fund.

Section 231.473 RSMo 1959 provides in part as follows:

"Allocations for construction, reconstruction and restoration from the county aid road fund shall not exceed two-thirds of the total cost of any project with the remaining expense to be borne from other funds made available by the county court."

From these sections it can be seen that the state highway commission, in administering the county aid road fund, deals exclusively with the county court. It would also be noted that there is no restriction on the source of the funds for the share of the county court for the construction of any such

Honorable Charles P. Moll

road. Rather, this statute provides that the remaining one-third of the cost shall be borne from "other funds made available by the county court." Section 231.465 RSMo 1959, quoted above, provides that township boards or special road districts may agree and contract with the county court in which such township or road district lies for payment to the county court of the money necessary to provide the county court's contribution to any project as provided by Sections 231.440 to 231.500.

Since a special road district may contribute to the County Court the county's portion of the cost of the road, it is implicit in Section 231.465 RSMo 1959 that roads may be constructed under Sections 231.440 to 231.500 RSMo 1959 which lie wholly or in part in a special road district. Furthermore, since a road lying wholly or in part in a special road district in any county is included in the definition of "county roads" used in connection with the county aid road fund, we conclude that it is proper to use funds made available by the county court and funds from the county aid road fund to build a road lying wholly or in part in a special road district under an approved project or program of the county aid road fund law or "King Bill" road law.

CONCLUSION

It is therefore the opinion of this department that funds made available by the county court and funds from the county aid road fund may be used to construct an approved road project or program under Sections 231.440 to 231.500 RSMo 1959, regardless of whether or not such road lies wholly or in part in a special road district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW:ca

July 5, 1961

No 64

Honorable George H. Morgan
Representative, 8th District
Jackson County
House of Representatives
Jefferson City, Missouri

Dear Mr. Morgan:

Under date of April 6, 1961, you requested an opinion of this office relating to House Bill No. 696.

On April 27, 1961, by letter prepared by my assistant, Joseph Nessenfeld, we wrote you stating our tentative views concerning the questions presented. Further study of the matter has fortified the opinion expressed in our letter and we adhere to the views therein expressed.

It is therefore the opinion of this office:

(1) That House Bill No. 696, if enacted into law, would be valid and constitutional, and that by statute the general assembly may create an interim committee and confer power upon such committee to issue process and enforce compliance therewith by contempt proceedings; and

(2) That under House Bill No. 696 as drafted, the chairman of the committee would have the right to issue subpoenas, but only with respect to witnesses designated by the committee.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:as

September 1, 1961



Mr. M. E. Morris, Director,
Department of Revenue,
Jefferson Building,
Jefferson City, Missouri

Dear Mr. Morris:

On April 26, 1961 you wrote to this office requesting an official opinion. After several conversations between our offices it has developed that the question for consideration is whether a surety bond which has been deposited with the Motor Vehicle Safety Responsibility Unit as security because of a past accident, may be cancelled by the surety company before the conditions in Section 303.060, RSMo 1959, have been met. This letter should fully answer your inquiry.

In Chapter 303, RSMo 1959, security is required to be deposited under the following set of conditions: If a motor vehicle operator is involved in an accident within this state in which any person is killed or injured, or in which damage to property of any one person in excess of \$100 is sustained, then the operator is required to file with the Department of Revenue a report of this accident. This report is to be filed within ten days of the accident (Section 303.040). Within twenty days after the receipt of the report, the Director of Revenue shall determine the amount of security needed to be filed by the motor vehicle operator or owner to satisfy any judgment for damages resulting from such accident. The Director shall suspend the license of such operator and all registrations of the owner of such motor vehicle within forty-five days of the receipt of the report unless such operator or owner, or both, shall deposit security in the sum previously determined by the Director.

The deposit of security requirements is qualified by excluding those operators or owners who had in effect at the time of such accident an automobile liability policy which sufficiently covered the operation of the motor vehicle or the liability of the operator. Also excluded from the security deposit requirements are those operators and owners covered by other forms

Mr. M. E. Morris

of liability insurance or bonds, and also any person qualifying as a self-insurer (Section 303.030). Other exclusions from the security deposit requirements are found in Section 303.070.

Assuming that security is required then Sections 303.050, 303.051 and 303.060 are applicable.

In reading these sections and other related sections within Chapter 303 it is the opinion of this office that the rationale behind this security deposit requirement is to guarantee (for a limited amount) the payment of a judgment rendered against a person on whose behalf the deposit was made for damages arising out of the accident in question. The exclusions from the requirements are fully justified because they either evidence the guarantee of payment upon a judgment or else they patently show that the operator or owner is not liable or, if so, has been released from such liability.

With this basic concept in mind this office is of the belief that surety bonds once given to satisfy security requirements should not be cancelled unless all of those conditions found within Section 303.060, *supra*, have been fully satisfied.

Throughout this entire chapter the Director of Revenue is given a great deal of discretion in determining the amount of security required and the form in which it is to be given. Thus he would be justified in conditioning the approval of all surety bonds given as security in the situation described above. This condition for approval can properly limit the cancellation only after the provisions of Section 303.060 have been fulfilled.

In your letter you quote at length Section 303.230, RSMo 1959. I draw your attention to the fact that this section refers to the furnishing of security bonds as proof of financial responsibility. This is of a different nature than the security requirements discussed above. As defined in this chapter proof of financial responsibility means only the proof to respond to damages for liability on account of accidents subsequent to the date of said proof. Thus this section is not applicable to the question under discussion.

I hope this letter will be of assistance to you in the proper administration of the Motor Vehicle Safety Responsibility Law.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

EGB:MW

MOTOR VEHICLE SAFETY RESPONSIBILITY UNIT:
PUBLIC RECORDS:

Citizens of Missouri have the right to make personal inspection of accident reports and be apprised of the security filed with the Motor Vehicle Safety Responsibility Unit.

September 13, 1961

Mr. M. E. Morris, Director,
Department of Revenue,
Jefferson Building,
Jefferson City, Missouri



Dear Mr. Morris:

This is in response to your letter dated August 9, 1961, requesting an opinion from this office concerning the interpretation of Senate Bill No. 284, recently enacted by the 71st General Assembly. This Act reads as follows:

"Section 1. Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement.

"Section 2. In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work.

Mr. M. E. Morris

The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impractical, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

In your letter you make the following inquiry:

"The Safety Responsibility Division of the Department of Revenue has heretofore refused access to automobile accident reports filed with us, under rules made by the Director of Revenue in accordance with the law.

"Under Senate Bill #284, the question arises whether we are justified in this position. We would appreciate a memorandum opinion from your office, relative to:

"(1) Who has the right to inspect or make copies of accident reports or the findings of this unit in connection with the accident;

"(2) Are we required to divulge to anyone the amount of security which we may require to be deposited with this department in connection with an accident where the insurance coverage is not ample."

Senate Bill No. 284 provides that certain records shall be "open for a personal inspection by any citizen of Missouri." In the opinion of this office said Act grants only the right to a personal inspection, and you are not required to furnish the information by mail. The personal inspection can be demanded as of right only by citizens of Missouri, but you are not precluded from permitting such inspection by others.

Mr. M. E. Morris

The right to a personal inspection extends to all those records kept by you pursuant to the Motor Vehicle Safety Responsibility Law, Chapter 303, RSMo 1959. The statutes specifically provide for the keeping of accident reports and in certain instances such security as may be required to satisfy any judgment for damages. In light of the fact that there are no provisions within Chapter 303, supra, which prohibit divulging contents of the records kept in conformance thereto, it is the opinion of this office that any Missouri citizen has the right to make a personal inspection and extract copies of accident reports and files pertaining thereto, and thereby be informed of the amount of the security deposited with your office.

CONCLUSION

As a result of Senate Bill No. 284 of the 71st General Assembly, it is the opinion of this office that upon the effective date thereof:

1. Any Missouri citizen has the right to make a personal inspection and to extract copies of those records maintained by your office in conformance with Chapter 303, RSMo 1959.

2. Any Missouri citizen has the right to personally inspect records pertaining to security deposits and thereby be apprised of the amount of security deposited with your office as may be required under Chapter 303, supra.

This opinion which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

TAXATION:
INCOME TAX:
ST. LOUIS EARNINGS TAX:
EXEMPTIONS:

Section 143.160, as amended, provides for a deduction for those taxes paid to the City of St. Louis upon compensation for personal services earned by resident and non-resident individuals.

October 4, 1961



Honorable M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Morris:

This is in response to your letter dated August 18, 1961, in which you request an official opinion from this office. Your letter is as follows:

"House Bill No. 159 passed by the 71st General Assembly and signed by the Governor, amends Section 143.160 RS Mo 1959.

"The paragraph in question, (4) Taxes, is amended by adding the words 'by any municipality on compensation for personal services.'

"In view of the words 'for personal services', is the St. Louis City Earnings tax which is paid by corporations deductible on the Missouri corporation income tax return?"

Section 143.160, RSMo 1959, provides for certain deductions which may be taken by individual and corporate taxpayers. These deductions are subtracted from gross income and result in the determination of net income. Examples of such deductions are ordinary and necessary business expenses, losses sustained during the taxable year, interest paid within the taxable year, taxes paid within the taxable year, and others. Your opinion request is specifically directed to that deduction concerning taxes paid within the taxable year. It is found in Subsection 4 of Section 143.160. This subsection reads as follows:

"(4) Taxes: All taxes paid within the year imposed by the authority of the United States or its territories or possessions, or foreign country or under authority of any state, county, school district or municipality or other taxing subdivision of any state or country, not including those assessed against local benefits and inheritance taxes and taxes based on income, except those imposed by any municipality on compensation for personal services or the United States on incomes."

Thus, the Legislature has granted the deduction from gross income for those taxes paid to a municipality upon "all compensation for personal services". The only tax of this nature presently authorized is the St. Louis Earnings Tax. The statutes enabling the City of St. Louis to impose such a tax are found in Chapter 92, RSMo 1959. They authorize the City of St. Louis to levy and collect:

"an earnings tax on salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by non-residents of the City for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city." Section 92.110, RSMo, 1959.

This statutory language is found verbatim in ordinance #47063, enacted by the City of St. Louis, April 28, 1954, which levies and imposes the earnings tax.

Section 2 of this ordinance was amended by ordinance #49540 effective July 24, 1959, and reads as follows:

"Sec 2.[Rate and basis of tax] A tax for general revenue purposes of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after July 31, 1959, by resident individuals

of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after July 31, 1959, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after July 31, 1959, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after July 31, 1959, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after July 31, 1959, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the city."

From the statute and ordinances listed above it is readily apparent that the St. Louis Earnings Tax is imposed upon two classifications of sources of income. One source is salaries, wages, commissions and other compensation earned by resident and non-resident individuals. The other source is net profits earned by associations, businesses or other activities conducted by residents or non-residents and net profits earned by corporations. The Legislature has specifically delineated these two distinct classes in Section 92.110. When it uses the statutory language in Section 143.160(4), "compensation for personal service," it seems reasonable that the Legislature intended for this phrase to apply only to salaries, wages, commissions and other compensation earned by resident and non-resident individuals. "Net profits" contemplate deductions for expenses, whereas "compensation for personal services" does not. The fact that Section 143.160(4) fails to mention an allowance of a deduction for taxes paid to a municipality based upon "net profits" indicates that a deduction of this nature is not provided for.

CONCLUSION

As you mention in your letter, Section 143.160 (4), RSMo 1959, grants a deduction for those taxes paid to any municipality imposed upon compensation for personal service.

Honorable M. E. Morris

It is the opinion of this office that the phrase "compensation for personal service" as used in Section 143.160, RSMo 1959, as amended, applies to the earnings tax imposed upon salaries, wages, commissions and other compensation earned by resident individuals of the City of St. Louis, and by non-resident individuals for work done or services performed or rendered in the City of St. Louis and has no reference to "net profits".

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

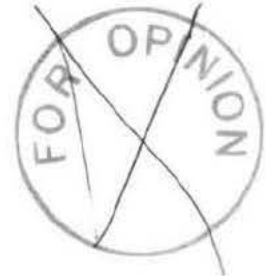
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Opinion Request No. 350 answered by letter.

November 10, 1961



Honorable George H. Morgan
Member, Missouri House of Representatives
12312 South 71 Highway
Grandview, Missouri

Dear Mr. Morgan:

This letter is in further reply to your inquiry of September 9, 1961, in relation to the Missouri Retail Credit Sales Act passed by the Seventy-First General Assembly of Missouri as Senate Bill No. 161.

A close review of Senate Bill No. 161 does not disclose that this office is vested with any authority to prescribe forms to be used under the law. In a recent communication of this office addressed to a party having an interest not dissimilar to that which your letter discloses, the following statement was made:

"Senate Bill No. 161 does not, by its terms, place any responsibility upon this office for its enforcement. While criminal penalties are prescribed, this legislation basically governs private civil rights and duties and provides civil remedies."

In advising members of the Legislature, and other officers, under the mandate found in Section 27.040, RSMo. 1959, this office has adhered to the rule that such advice should be limited to questions of law relative to the office or the discharge of the officers' official duties. While your concern for the interest of your constituents in this matter is fully appreciated, it is not feasible under the law for this office to make recommendations in answer to specific inquiries contained in your letter of September 9, 1961.

Honorable George H. Morgan

November 10, 1961

-2-

Trusting that you will appreciate my position in
this regard, I remain

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO 'M:mc

LEGISLATIVE DISTRICTS:
SENATORIAL REDISTRICTING:
REPRESENTATIVE REDISTRICTING:
DECLARATION OF CANDIDACY:
FILING FEE OF CANDIDATES:
VOTING MACHINES:
ELECTIONS:

A declaration of candidacy for nomination as senator or representative in Jackson County filed prior to the creation of the new senatorial and representative districts after the 1960 census is a nullity. The filing fee paid with such invalid declaration may be applied to a valid declaration of candidacy thereafter filed.

December 27, 1961



Honorable George H. Morgan
Representative, 8th District
Jackson County
12312 South 71 Highway
Grandview, Missouri

Dear Mr. Morgan:

This will answer your letter requesting an opinion on a number of questions relating to candidacies for the offices of senators and representatives from Jackson County. We will consider these questions in order.

Your first question is as follows:

"1. In view of Sections 120.320, 120.330 and 120.340 Revised Statutes of Missouri, 1959, may a candidate file a declaration prior to the time when the Secretary of State has designated the offices for which the candidates are elected? (Ergo, is Section 120.320 in effect the official act initiating the election and no offices are subject to filing prior to the date of this notification?)"

This office has rendered an opinion to Honorable Warren E. Hearnes, Secretary of State, under date of December 20, 1961, a copy of which is herewith enclosed, which answers this question. In that opinion we ruled that declarations of candidacy for an office may be filed at any time after the completion of the general election next preceding the August primary election at which nominations for such office are to be made, but not later than the last Tuesday in April.

Honorable George H. Morgan

Your second question is as follows:

"2. What is the status of a candidate who files for the Thirteenth District (the new district to be created in Jackson County) prior to its creation?

a. If, upon its creation, he lives within the district?

b. If, upon its creation, he does not live within the district?

c. If the filing is deemed to be a valid filing, is its priority for position on the ballot as of the date of filing, or as of the date of the creation of the district?

It is the opinion of this office that until an office has been created, no person may validly file a declaration of candidacy for nomination for such office. Therefore, until the new district has been created, a declaration of candidacy theretofore filed is a nullity and does not operate to give the candidate a priority of position on the voting machine ballot.

Your third question is as follows:

"3. What is the status of a candidate filing for a district within which he now lives, if after his filing the declaration the lines of the district are changed so that he no longer resides within the district?

a. Is his filing void?

b. Is he deemed to have filed for the district in which he subsequently resides?

c. If his filing is deemed to be a valid filing, is its priority for position on the ballot as of the date of filing, or as of the date of the creation of the district?"

It is the opinion of this office that all of the senatorial and legislative districts in Jackson County went out of existence after the 1960 decennial census with the result that until new districts have been created as provided by law no person may validly file a declaration of candidacy for nomination for senator or representative from any such district.

Honorable George H. Morgan

In *Preisler v. Doherty*, 365 Mo. 460, 284 S.W. 2d 427, 1.c. 436, our Supreme Court expressly ruled:

"Thus all senatorial districts must go out of existence after each decennial census."

The same principle is applicable to representative districts, in our opinion. After the Secretary of State certifies to the county court the number of representatives to be elected in a particular county, the county court thereof, pursuant to Section 3, Article III of the constitution, "shall divide the county into districts". And Section 22.050, RSMo, which implements the Constitution, provides in part:

"Within sixty days after being officially so informed [of the number of representatives to be elected in such county], the county court * * * shall divide [the county] into representative districts . . ."

The foregoing provisions can mean only that after each decennial census, new divisions of the county into districts must be made. The old districts go out of existence even if the new districts into which the county is divided have the same boundaries as the former ones. This office so ruled in an opinion to Paul C. Calcaterra, Chairman of the Board of Election Commissioners of the City of St. Louis, under date of August 29, 1951. In that opinion, this office held in part:

"The Board may, in redistricting after each census, use the same boundaries in the new districts that the present districts have, but such Board must create new districts after each decennial census."

Therefore, in the opinion of this office, any declaration of candidacy filed before the new districts have been created is a nullity, there being no office in existence for which the candidate may seek nomination.

Your fourth question is as follows:

"4. What is the status of a candidate filing for a district in the event that subsequent

Honorable George H. Morgan

to the filing of the declaration the number of the district is changed?"

This question is answered by the ruling above made.

Your fifth question is as follows:

"5. In the event that any of the earlier filings are deemed invalid, may the filing fee paid to the Treasurer of the State or County Committee be applied to a corrected filing of a declaration, or is it forfeited?"

It is the opinion of this office that the filing fee paid by the candidate whose declaration of candidacy is invalid by reason of having been filed prior to the creation of the district which he seeks to represent may be applied by him to a subsequent valid declaration filed after the district has been created. Section 120.350, RSMo 1959, requires the candidate, previous to filing declaration papers to pay the requisite fee. Although the statute contains further provisions that the receipt for such payment shall be filed "with" the declaration, the purpose of this provision is simply to afford evidence of payment. In the circumstances described in your letter, the officials with whom the new declarations are filed not only have actual knowledge of the fact of payment, but have the receipts therefor in their files. This constitutes a substantial compliance with the requirements of Section 120.350. Attention is also called to cases in which declarations of candidacy were held valid even though the receipt for the fee was not filed until afterwards. See for example State ex rel Dodd v. Dye, Mo. App., 163 S.W. 2d 1055; State ex rel Huse v. Haden, 349 Mo. 982, 163 S.W. 2d 946; State ex rel Haller v. Arnold, 277 Mo. 474, 210 S.W. 374 and State ex rel Neu v. Waechter, 332 Mo. 574, 58 S.W. 2d 971.

Your final question is as follows:

"6. In the event that the prior filings for a district thereafter created are deemed to be valid and/or simultaneously filed as of the time of the creation of the district, will it be an appropriate procedure to draw by lots for position on the voting machine ballot?"

This question need not be answered, in view of our ruling above that the declarations of candidacy for a district prior to its creation are invalid.

Honorable George H. Morgan

The rulings herein have no application to elections to fill vacancies caused by the resignation or death of incumbent members of the General Assembly who were elected prior to the 1960 census. Our ruling applies only to the election of senators and representatives for terms commencing subsequent to a redistricting resulting from the decennial census.

CONCLUSION

It is the opinion of this office that until the legislative and senatorial districts in Jackson County have been created in accordance with the constitutional and statutory provisions after the 1960 decennial census, no person may validly file a declaration of candidacy for nomination as senator or representative from any such district, and that until such district has in fact been created a declaration of candidacy theretofore filed for any such office is a nullity and does not operate to give the candidate a priority of position on the voting machine ballot. Filing fees paid in connection with such invalid declarations may be applied by the candidate in connection with a subsequent valid declaration of candidacy filed after the creation of the district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

ASSESSMENT OF	TAXATION:	Improvements on leased land normally to
	PROPERTY:	be assessed against the owner thereof.
	LANDLORD:	Lessee's leasehold interest may be assessed
	TENANT:	separately as realty.

August 14, 1961



Honorable Clarence H. Overbay, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This is in answer to your request for an opinion, which request reads as follows:

"The Dunklin County Court has asked me to write you and ask the following question: To whom are the improvements upon leased land assessed? In other words is the lessor or lessee assessed for any improvements placed upon the land? They would also like to know whether the improvements are to be classified as real or personal property.

"The County Court was following the assessor's manual 1958 on page 28, however they are not quite sure this is the correct interpretation."

The general statutory rule to be followed in the assessment of property for taxation is set out in Section 137.075, RSMo 1959, as follows:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Under this section, the tax liability for improvements on leased land attaches to the owner of such improvements. If title to improvements is held by the lessee, he should be assessed.

Honorable Clarence H. Overbay, Jr.

This principle was recognized by the Supreme Court in *State ex rel. Ziegenhein v. Mission Free School*, 62 SW 998. There, one Thompson had constructed a building on land leased from a charitable corporation. The lease clearly stated that the building should be the property of Thompson. A judgment against Thompson for taxes on the building was reversed for a failure to make a proper assessment, but the court defined the tax liability as follows (l.c. 999):

" * * * It is thus evident that, as between the said Mission School and said Thompson, Thompson is the owner of the leasehold and building, and is liable for the taxes thereon, whether it is real estate or personal property; but as said in *State v. Thompson*, 149 Mo. 445, 51 S.W. 98, before he can be compelled to respond for said taxes his estate in said leasehold and building must first be assessed against him, as the owner thereof.
* * *"

Thompson contended that his building and leasehold interest could not be assessed separately from the land, which was tax-exempt. The court answered, saying (l.c. 999):

" * * * All property except such as is specifically exempted by the constitution and the statute made in pursuance thereof is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building, any more than would be encountered in assessing the property of any other individual. Whether it is real or personal property, or whether the state is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is. And it is Thompson's duty to list it, just as every other taxpayer is required to list his property or suffer the penalties. The point may be new in this court, but has often been solved in other jurisdictions. *People v. Board*, 93 N.Y. 308; *People v. Commissioners*, 82 N.Y. 459; *Russell v. City of New Haven*, 51 Conn. 259; *Smith v. Mayor*, etc. of City of New York, 68 N.Y. 552.
* * *"

Honorable Clarence H. Overbay, Jr.

This case points up another proposition to be considered in assessing leased property, that is, that a lessee's interest in leased improvements is also subject to taxation, even though title to the property is in the lessor. Section 137.010(2), RSMo 1959, states as follows:

"The following words, terms and phrases when used in laws governing taxation and revenue in the state of Missouri shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

* * * * *

(2) 'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto."

The rule is stated in 51 American Jurisprudence, Section 435, page 452, that:

" * * * Although by virtue of the common law a leasehold remains a chattel real, it is within the power of the state to declare its nature contrary to the common law for the purpose of taxation. A lease of real estate is undoubtedly property in the hands of the lessee, and is assessable to the lessee if it is a valuable asset to him."

This principle has been recognized in Missouri in State ex rel. Ziegenhein v. Mission Free School, supra, and, more recently, with respect to leased buildings, in State ex rel. Benson v. Personnel Housing, 300 SW2d 506.

In the latter case the defendant, a private housing corporation, had leased land from the federal government for the construction of a housing development. The lease, as amended, provided for a 75 year term with title to the buildings constructed to be held by the lessor, the government. It also provided that the defendant was to pay all taxes. The Supreme Court first held

Honorable Clarence H. Overbay, Jr.

that the buildings were not exempt because title was held by the government. The court then went on to answer defendant's contention that there is no statutory authorization for the assessment against defendant of its leasehold interest in the buildings, as follows (300 SW2d 1.c. 508-509):

"Under our Constitution of 1945, all property in this State must be taxed unless expressly exempt therefrom. See Art. 10, Sec. 6, V.A.M.S. Note the concluding provision of this section which reads that 'All laws exempting from taxation property other than the property enumerated in this article, shall be void.' See State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S.W. 998, loc. cit. 999(1). Note also the provisions of Art. 10, Sec. 3, which states that 'Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.' Section 137.010 RSMo 1949, V.A.M.S., classifies property for the purposes of taxation as follows:

'(1) "Intangible personal property," for the purpose of taxation, shall include all property other than real property and tangible personal property, as defined by this section;

'(2) "Real property," includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto;

'(3) "Tangible personal property" includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined.'

"Plaintiff and defendant in their briefs have cited and reviewed many cases in support of their positions. Many of these are of little

Honorable Clarence H. Overbay, Jr.

value in deciding this case because the Housing Projects, such as we are dealing with in this case, were designed in recent years and the manner of taxation of such property is new. Let us consider this case from a common sense and practical viewpoint. There are 120 housing units for which the cost of construction was \$1,134,472. The gross yearly rent amounts to over \$118,000. The U. S. Government owns the land upon which the buildings are located. The defendant corporation, under a lease with the Army, constructed the buildings. As stated by the U. S. Supreme Court, 351 U.S. loc. cit. 261, 76 S. Ct. loc. cit. 819, 100 L. Ed. loc. cit. 1160, 'The lease is for 75 years; the buildings and improvements have an estimated useful life of 35 years. The enjoyment of the entire worth of the buildings and improvements will therefore be petitioner's.' In the case before us, the defendant is in the same position as the petitioner mentioned in that case. The Congress has given its consent that the interest of the lessee may be taxed by the local authorities. The defendant-lessee has agreed, in its contract with the Army, to pay all the taxes that may be assessed. Would it not be absurd to say that the buildings and improvements in question should not or cannot be taxed? We hold that under the constitutional and statutory provisions, supra, the interest of the defendant in the property is subject to taxation."

While the court in that case held that the defendant, though having but a leasehold interest, should be assessed for the full value of the buildings, it appears that this result was reached due to the fact that the term of the lease was twice as long as the estimated useful life of the buildings. To this extent, the Personnel Housing case should be limited to its facts. It does, however, stand for the proposition that a lessee's interest in leased improvements is subject to taxation separately from the reversionary interest of the lessor. As a practical matter, this situation most commonly arises when exempt property is leased to a non-exempt party.

Honorable Clarence H. Overbay, Jr.

With respect to your question as to the manner in which such improvements are to be assessed, Section 137.010(2), supra, includes improvements in the definition of "real property" for purposes of taxation. Also, in State ex rel. Benson v. Personnel Housing, supra, the Supreme Court held that a leasehold interest was properly assessed as real estate, saying (300 SW2d 1.c. 510-511):

"We hold that defendant's interest in the property in question is in fact valuable property and that it not only may be but should be taxed. We also hold that the assessment of the defendant's interest as real estate was a legal assessment. It was so classified by Section 137.010(2), supra. * * *"

CONCLUSION

From the foregoing it can be concluded that, generally, improvements on leased land are to be assessed against the owner of such improvements, be he lessor or lessee. However, the principle is well established that the lessee's interest may be assessed separately from the lessor's reversionary interest. In either case, the property shall be assessed as realty.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

STRAY ANIMALS: The sheriff is not authorized to employ private citizens at public expense to take up, keep or feed any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat which may be found running at large outside the enclosure of the owner under Section 270.010, RSMo 1959. This is a duty specifically delegated to the sheriff and he is responsible for its performance.

August 30, 1961



Honorable Clarence Overbay, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Overbay:

Your request for an official opinion from this Department, dated May 31, 1961, reads as follows:

"In Re: 1959 Missouri Revised Statute
Section 270.010.

"Dear Sir:

"Under the above statute is the Sheriff of Dunklin County entitled to hire necessary help in rounding up animals named in this statute, and entitled to hire someone to keep said animals until the rightful owner is notified and given an opportunity to pick them up?

"I will give you a short illustration of our problem here in Dunklin County. The stock law was adopted in Dunklin County in 1920. Most of the land is flat and only a few persons have farm animals anymore. We have a few individuals raising mostly cattle and hogs who will let their fences get in such a state that their stock cannot be kept in. The animals then roam over their neighbors property destroying all kinds of crops."

Your question involves the right of the sheriff to hire help at county expense in rounding up animals running at large. Section 270.010, RSMo 1959, makes it unlawful for the owners of

Honorable Clarence Overbay, Jr.

certain animals to permit such animals to run at large outside the enclosure of the owner. If such animals are found running at large, Section 270.010 provides: ". . . it is hereby made the duty of the sheriff or other officer having police powers, on his own view, or when notified by any other person that any of such stock is so running at large, to restrain the same forthwith . . .," and the last sentence of this section provides: "Any failure or refusal on the part of such officer to discharge the duties required of him by this section shall render him liable on his bond to any person damaged by such failure or refusal" Section 270.050 also provides that in cases where appraisers are appointed to assess damages the officer shall be entitled to a certain fee and mileage in serving notice on the appraiser.

The above described duties of rounding up animals running at large by the sheriff are mandatory. He is the proper officer to enforce the terms of Chapter 270. It is not within the discretion of the sheriff to decide whether his responsibilities are too onerous and therefore the county should hire private citizens at county expense to round up stray animals.

This is a duty specifically delegated to the sheriff and he is not entitled to any additional compensation therefor except as specifically provided in the statutes. The Supreme Court of Missouri in the case of Nodaway County v. Kidder, 129 S.W. (2d) 860, stated:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer."

It appears from the above chapter that the sheriff is charged with the responsibility of rounding up and confining animals running at large. This chapter does not provide any authority for the sheriff to incur general obligations on behalf of the county while performing these duties.

Honorable Clarence Overbay, Jr.

CONCLUSION

It is our conclusion that the sheriff is not authorized to employ private citizens at public expense to take up, keep or feed any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat which may be found running at large outside the enclosure of the owner under Section 270.010, RSMo 1959. This is a duty specifically delegated to the sheriff and he is responsible for its performance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Very truly yours,

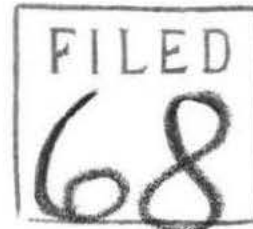
THOMAS F. EAGLETON
Attorney General

CB:gm

LEWDNESS:
COHABITATION:
CRIMINAL LAW:
EVIDENCE:

An unmarried man and woman, who are living together and holding themselves out as husband and wife can be prosecuted for open, gross lewdness or lascivious behavior under Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations.

September 13, 1961



Honorable Clarence H. Overbay, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Overbay:

This is in reply to your opinion request of July 1, 1961, wherein you ask if Section 563.150, RSMo 1959, includes two unmarried persons who are living together and holding themselves out as husband and wife but who have not been seen by witnesses committing any wrongful act?

Section 563.150, RSMo 1959, states, in part, as follows:

"... and every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor."

In *Adams v. Commonwealth*, 162 Ky. 76, 171 S. W. 1006, the Kentucky Court of Appeals stated:

"In *Roberson's Criminal Law*, vol. 2, p. 830, it is said: 'Open and gross lewdness, or whatever openly outrages decency and is injurious to public morals, is a misdemeanor and indictable at common law. Thus the living together of a man and woman unmarried, which is generally known throughout the neighborhood, is sufficient to constitute open and notorious lewdness, without proving it to have been in a street or under

Honorable Clarence H. Overbay, Jr.

the immediate observation of strangers.' "

In State v. McGehee, 308 Mo. 560, 274 S. W. 70, the Court in discussing Section 3513, RSMo 1919 (which was identical to Section 563.150, RSMo 1959) stated:

"In order to be guilty of the violation of Section 3515 by persons unmarried, they must be guilty of living together in open and notorious manner, or be guilty of open, gross lewdness. The statute is violated by any person married or single where the immoral act is open and notorious."

In State v. Bess, 20 Mo. 420, John Bess and Polly Bess (alias Polly Cox) were charged by indictment with living "in a state of open and notorious adultery, and did then and there lewdly and lasciviously abide and cohabit with each other; and was then and there guilty of open, gross lewdness and lascivious behavior, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other, contrary, . . ."

Although declaring the indictment insufficient in regard to the charges of (1) living in a state of open and notorious adultery, and (2) lewdly and lasciviously abiding and cohabiting with each other because the indictment did not allege and charge that either defendant was married and not to each other, the court stated:

"But there is a third clause of this section, in which it is provided against those persons, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior. . . . The indictment, however, contains a third charge, and it is stated correctly under the statute. After setting forth the two charges, as noticed above, it proceeds thus: 'And were then and there guilty of open, gross lewdness and lascivious behavior, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other.' Here we find an offense sufficiently charged

Honorable Clarence H. Overbay, Jr.

in the indictment, and sufficiently described under the statute. What act can be more grossly lewd or lascivious than for a man and woman, not married to each other, to be publicly living together, and cohabiting with each other? . . . The offense charged is an act of open, gross lewdness and lascivious behavior. The manner in which the offense is perpetrated is by the defendants publicly, lewdly and lasciviously cohabiting together."

See, also, State v. Hopson, 76 Mo. App. 483; see, also, State v. Chandler, 33 S.W. 797, 132 Mo. 155.

Thus, it is clear from the foregoing authorities that an unmarried man or woman, who are living together and holding themselves out as husband and wife would be in violation of the quoted portion of Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations. As stated in State v. Crowner, 56 Mo. 147, l.c.150:

"The statute was intended to provide against persons who in defiance of morality and of the good or well-being of society should openly live together; they must reside together publicly in the face of society as if the conjugal relation existed between them, their illicit intercourse must be habitual."

In State v. Pedigo, 176 S. W. 556, l.c. 558, the Court used this language:

"Yet, what is meant by living and cohabiting together necessarily implies, and the jury must find, that acts of sexual intercourse take place, but no court would require the jury to find that some person actually saw such acts take place."

However, because of the peculiar nature of the crime, it may be proven in its entirety by circumstantial evidence rather than direct evidence.

Honorable Clarence H. Overbay, Jr.

In State v. Stout, 198 S. W. 2d 364, defendants appealed a conviction of unlawfully, lewdly and lasciviously abiding and cohabiting with each other, and then and there habitually having sexual intercourse with each other. Although there was no direct testimony of sexual intercourse between the defendants, the testimony tended to show that defendants during the time alleged in the information ate their meals together; that Stout bought the groceries and paid the rent; that they occupied the same bedroom and were seen in bed together on numerous occasions.

The Springfield Court of Appeals, in holding that the evidence was sufficient to sustain the conviction, stated, l. c. 367:

"The crime charged by the information in the case at bar is not established by a single act or by the conduct of a single day but by continuing acts and conduct over a period of time of more or less duration. Much of the evidence is circumstantial but it proves circumstances from which other circumstances are deductible which tend to establish the guilt of the defendants. This character of evidence is admissible, and especially so on the trial of an offense as here charged, the proof of which in the majority of cases, the state must rely almost exclusively, if not wholly, upon circumstantial evidence. Moreover, when a fact is to be established by circumstantial evidence, all surrounding circumstances are proper to be considered by the jury if they have any bearing on the ultimate fact sought to be established. It is not necessary to prove by direct evidence the charge alleged in the information. It may be done entirely by circumstantial evidence."

Honorable Clarence H. Overbay, Jr.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that an unmarried man and woman, who are living together and holding themselves out as husband and wife can be prosecuted for open, gross lewdness or lascivious behavior under Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc



September 26, 1961

Honorable J. L. Pickard
Commissioner of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Pickard:

This letter of advice is furnished in lieu of a formal opinion in answer to your letter of September 5, 1961, requesting an outline of your duties under the Missouri Retail Credit Sales Act passed by the 71st General Assembly, effective October 13, 1961.

The Act in question relates to and regulates retail credit selling and financing of certain goods and services purchased under a retail time contract or on account under a retail charge agreement.

In Section 5 (a) of the Act an introduction to your duties is found in the following language:

"A buyer may be required to provide insurance on the goods at his own cost for the protection of the seller or other person holding a retail time contract or account under a retail charge agreement, as well as the buyer, but such insurance shall be subject to limitations provided for in regulations promulgated and issued by the Commission[er] of Finance pursuant to the provisions of section 5 (c)."

Section 5 (c) of the Act provides:

"The amount of any life insurance shall not exceed the amount of the total unpaid balance from time to time under a retail time contract or under a retail charge

Honorable J. L. Pickard

agreement, provided, however, that where the buyer's obligation under a retail time contract is repayable in payments which are not substantially equal in amount, such insurance may be level term insurance in an amount which shall not exceed by more than five dollars (\$5.00) the time balance as determined under section 3 (e). The Commissioner of Finance, or such agency or agencies as may exercise the powers and duties now performed by such Commissioner, shall issue regulations providing for and governing the types and limits of all other insurance and the issuance of policies in connection with retail time transactions. Nothing in this section shall alter or amend the statutes of this state relating to insurance or affect the powers of the Superintendent of Insurance under such statutes."
(Underscoring supplied)

Language found in the forepart of Section 5 (c) of the Act, quoted above, spells out its own limitations as to amounts and types of life insurance which may be required with reference to either a retail time contract or a retail charge agreement. Such language is then followed by specific language vesting a power and mandatory duty in the Commissioner of Finance to issue regulations providing for and governing the types and limits of all other insurance. The words "all other insurance" must necessarily refer to any insurance other than life insurance. While this special language in Section 5 (c) of the Act granting authority to the Commissioner of Finance to issue regulations in relation to insurance other than life insurance mentions only "retail time transactions" as distinguished from "retail charge agreements", as such language is used in this Section 5 (c) when treating of limits and types of life insurance, it is apparent that both types of time transactions were intended to be covered by the language vesting power in the Commissioner of Finance. This conclusion is further strengthened by language quoted, supra, from Section 5 (a) of the Act which provides that a buyer may be required to provide insurance "on the goods" for the protection of the seller or other person holding a "retail time contract" or a "retail charge agreement".

It may therefore be reasonably concluded that as Commissioner of Finance, under authority granted to you by Sections 5 (a) and (c) of the Missouri Retail Credit Act, you are authorized to

Honorable J. L. Pickard

issue regulations governing the types and limits of insurance, other than life insurance, which may be required by the seller or holder of "retail time contracts" or "retail charge agreements" contemplated by the Act.

In preparing regulations authorized by Section 5 (a) and (c) of the Act, it is recommended that such regulations should not treat of matters in relation to insurance which you find are clearly dealt with in sections of the Act.

The scope of regulations which you are authorized to make under the Missouri Retail Credit Sales Act has been generally outlined above. Obviously, you are vested with reasonable discretion in formulating such regulations, and specific wording of the same must necessarily be left with you. This office stands ready to offer close advice when you determine upon specific provisions to place in your regulations.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'N:aa

PUBLIC LIBRARIES:
FIRST CLASS CITIES:
COOPERATIVE SERVICES:
DIRECTORS MAY CONTRACT FOR:

Directors of a public library of first class city are authorized by Section 182.301, RSMo 1959, to contract with governing body of any other public library in state for cooperative library services. Such contract is not subject to review, approval or disapproval by council of such first class city.

May 8, 1961

Honorable Paxton P. Price
State Librarian
Missouri State Library
State Office Building
Jefferson City, Missouri

Dear Mr. Price:

This office is in receipt of your recent request for a legal opinion, which reads in part as follows:

"1. Does the Board of Directors of a public library in a city of first class have statutory authority under Chapter 182 of the Revised Statutes of 1959 to contract with other library districts to give or receive library service?"

"2. If your opinion in answer to '1' above is affirmative, is the contract they enter subject to review or approval by the City Council?"

All statutory reference herein are to RSMo 1959, unless otherwise specified.

Sections 182.310 to 182.400, specifically deal with public libraries of cities of the first class.

Section 182.310, provides that a library board of a city of the first class, shall consist of nine directors, to be appointed by the mayor in the same manner as other officers. The directors are appointed for the respective terms set out in Section 182.320, and they may be removed from office by the mayor for misconduct or neglect of duty, as in the case of other appointive officials.

Section 182.340, provides for the organization of the board of directors, and what powers they shall have. Said section reads as follows:

"1. Said directors of the public library shall,



Honorable Paxton P. Price

immediately after appointment, meet and organize by the election of one of their number president, and by the election of a secretary and a treasurer, and such other officers as they may deem necessary; and such election of such officers shall be held annually thereafter at such time as may be ordered by the library directors in their bylaws.

"2. They shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the library, branch libraries and reading rooms as may be expedient, not inconsistent herewith. They shall have exclusive control of all the moneys collected to the credit of the library fund and of the construction and equipment of any library building, and the supervision, care and custody of the grounds, rooms and buildings constructed, leased or set apart for that purpose, and of the purchase of books and all supplies necessary in the conduct of a public library.

"3. Said directors of the library shall have power to purchase or lease ground, to occupy, lease or erect an appropriate building or buildings for the use of said library, or branches or reading rooms thereof -- and all such cities of the first class shall have the right and power upon the recommendation of the directors of public libraries to condemn land or sites to be used for the erection of public libraries thereon, which land may be acquired by condemnation in the same manner as other land for other public purposes is acquired and may provide for the payment of such land and the erection of buildings thereon for public libraries and reading rooms by apportioning money out of the general revenue fund for such city, or by the issuance and sale of public improvement bonds for that purpose as other public bonds are issued by such city and shall have power to appoint a suitable librarian and necessary assistants, and fix their compensation, and shall also have power to remove such appointees; and shall, in general, carry out the spirit and intent herein establishing and maintaining a public library, branches and reading rooms; provided, that public

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libraries may be erected by said board by and with the consent of the board of park commissioners upon lands now acquired or which may afterwards be acquired for park purposes in cities to which this section applies."

It is noted that Sections 182.310 to 182.400, do not expressly or by necessary implication authorize the board of directors to enter into a contract with the board of any other library district for cooperative library services for the respective districts, represented. If the directors' powers to enter into contracts of this nature were entirely dependent on said specific statutes, relating to libraries of cities of the first class, then the directors of such libraries would be without statutory authority to contract. However, these sections are not all the statutory law on the subject, as Sections 182.140 to 182.301 are general statutes pertaining to libraries of cities of every class.

Section 182.301, empowers a city, or city-county library board to contract with the controlling body of a city, school, county, or other public library within the state for cooperative library service. Said section reads as follows:

"Any city library board or any city-county library board may contract for cooperative service with the body having control of a city library or school library or a county or other public library or any other library within the state under such terms or conditions as may be stated in the contract and the body having control of any library in the state may contract with city, city-county, county or public library in the state.

This section permits any city library board to make a contract for such cooperative library services with the controlling body of any other public library " * * * under such terms or conditions as may be stated in the contract * * * ", and of course the power to contract, granted by this section, is granted to directors of a library of a city of the first class. Such directors are thereby authorized to enter into any contract for cooperative library services which they believe to be proper so long as they do not exceed any of the provisions of Section 182.340 supra, specifically setting out the powers of directors of a library of a first class city. Subject to this exception the directors powers to contract for cooperative library

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services are unlimited.

Therefore, in view of the foregoing, and in answer to your first inquiry, it is our thought that the board of directors of a library of a city of the first class is authorized, by the provisions of Section 182.301 supra, to contract with the board of any other library district for the purpose of giving or receiving library service.

The second inquiry reads as follows:

"2. If your opinion in answer to '1' above is affirmative, is the contract they enter subject to review or approval by the City Council?"

Section 182.340 supra, gives the board of directors of a library of a city of the first class exclusive control of the library funds, control and management of the library, equipment, building and grounds. It appears the powers granted to them are very broad, and so long as such powers are not abused, and they are exercised within the scope fixed by the statute, they are unlimited, and they are not subject to the review or approval of the mayor or city council, assuming that the directors, in exercising their powers, are not guilty of misconduct or neglect of duty. If they are guilty of misconduct or neglect of duty, the mayor, in his discretion, is authorized by Section 182.320 supra, to remove them from office, and such vacancies may be filled in accordance with the provisions of Section 182.330.

A careful examination of Sections 182.310 to 182.400, fails to disclose any statutory power granted to the council of a city of the first class to review, approve or disapprove any contract entered into by the board of directors of a library of a city of the first class, with the board of any other library district for cooperative library services, under provisions of Section 182.301 supra.

In the absence of any statutory power conferred upon the council of a city of the first class the council lacks the power and cannot review, approve or disapprove any such contract of the directors of the library board for cooperative library services.

Therefore, in view of the foregoing, our answer to your second inquiry is in the negative.

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CONCLUSION

Therefore, it is the opinion of this office that the board of directors of a public library of a city of the first class is authorized by the provisions of Section 182.301, RSMo 1959, to contract with the governing body of any other public library within the state, for cooperative library services for the inhabitants of the respective library districts represented.

It is further the opinion of this office that the contract of the directors of a public library of a city of the first class, with the governing body of any other public library in the state, for cooperative library services, is not subject to review, approval, or disapproval by the council of said first class city.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

PNC:vm

PUBLIC LIBRARIES:

CONSTITUTIONAL CHARTER CITIES:

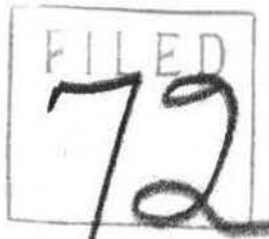
ELIGIBILITY FOR STATE AID:

Constitutional charter cities levying and collecting library tax of one mill on dollar of assessed valuation imposed by city ordinance under authority of Secs. 137.020 and 94.400, RSMo 1959, sufficiently meets requirements of Sec. 181.060, RSMo 1959, as to amount, and if tax was duly assessed and levied for the year preceding that in which application for state aid grant was made the library of said city is eligible for a state aid grant under provisions of said Sec. 181.060

October 26, 1961

Honorable Paxton P. Price,
State Librarian,
State Office Building,
Jefferson City, Missouri

Dear Mr. Price:



This is to acknowledge receipt of your recent request for a legal opinion, which reads as follows:

"Is a constitutional charter city levying and collecting a library tax by city ordinance under the authority of Section 137.030 RSMo eligible to receive State Aid for Public Libraries provided in Section 181.060 which specifies the taxing authority to be used for eligibility provided the total library tax collected equals the required qualifying amount?"

The above inquiry is in general terms and makes no reference to any particular constitutional charter city, and of course requires an answer which shall be applicable to all constitutional charter cities of the same class.

In a conversation with you regarding said inquiry, we understand it was occasioned by occurrences in University City, Missouri, and also as to whether or not the library of the city is entitled to a grant of state aid under provisions of Section 181.060, RSMo 1959.

Correspondence attached to the opinion request indicates University City is a constitutional charter city and that its current library tax rate was not authorized by a vote of the citizens in accordance with the provisions of Section 182.140 RSMo 1959. More specifically, it appears the Council of said city duly enacted an ordinance, Bill No. 5822, on June 27, 1960, fixing the library tax rate for the city at one mill on the dollar, for the period, 1960-61. It is claimed in said correspondence that the tax rate is in an amount sufficient to entitle the library to a state grant of aid, under provisions of Section 181.060, RSMo 1959, for the fiscal year, 1961-62.

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Section 181.060, RSMo 1959, provides for state grants of aid to public libraries under certain conditions, and reads in part as follows:

"* * * No grant shall be made to any public library if the rate of tax levied or the appropriation for the library should be decreased below the rate in force on December 31, 1946, or on the date of its establishment. Grants shall be made to any public library if a library tax of at least one mill has been voted in accordance with Sections 182.010 to 182.460, RSMo, or as authorized in Section 137.030, RSMo, and is duly assessed and levied for the year preceding that in which the grant is made, or if the appropriation for the public library in any city of the first class yields one dollar or more per capita for the previous year according to the population of the latest federal census* * *."

That part of the above quoted section referring to Sections 182.010 to 182.460, RSMo 1959, is in regard to county and city libraries. Section 182.140 is included therein, and contains the statutory procedure for the establishment of a public library in any city and for the authorization of a mill tax of not to exceed two mills on the dollar annually for the support of the library, when the proposition has been submitted to, and has been adopted by a majority vote on such proposition.

The present inquiry, and the facts involved in same are not directly concerned with a library tax authorized by a vote of the people of the city. We only refer to said Section 182.140 in passing for the reason we wish to show that a city library tax may be authorized by a vote of the people of a constitutional charter city as set out by Section 182.140, or by a city ordinance in accordance with provisions of Section 94.400, to which section later reference will be made. Furthermore, Section 182.140 must be kept in mind as included in the group of statutes referred to in Section 181.060, supra, on requirements for eligibility of a library for state aid.

Section 137.030, RSMo 1959, is also referred to in Section 181.060, supra, and Section 137.030, RSMo 1959, and reads as follows:

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"Any county, or other political subdivision otherwise authorized by law to support and conduct a library may levy for library purposes in addition to the limits prescribed in section 11, article X of the Constitution a rate of taxation on all property subject to its taxing powers in an amount as now or hereafter prescribed by law; provided, that political subdivisions now having or hereafter having a population of not less than three hundred thousand inhabitants nor more than six hundred thousand inhabitants according to the last federal decennial census are authorized to levy for library purposes a rate which shall not exceed ten cents on the hundred dollars assessed valuation annually, on all taxable property in such subdivision." (Under-scoring ours).

Section 11(b), Article X, Constitution of Missouri, prescribes the limitation of local tax rates. For municipalities the limitation shall not exceed one dollar on the one hundred dollars assessed valuation.

Section 11(c), Article X, of the Constitution provides that local taxes may be increased above the limitation previously mentioned, for certain purposes among which is that for library purposes. That part of the section on library and other taxes, reads as follows:

" * * * provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited for library, hospital, public health, recreation grounds and museum purposes."

Section 15 of Article X, provides that the term "other political subdivision" as used in the Article (i.e. Article X of the Constitution) shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levy districts and any other public subdivision, corporation, or quasi-corporation having taxing powers.

Honorable Paxton P. Price

Cities, as "other political subdivisions," within the meaning of Section 15, Article X, would be authorized by Section 11(c) to increase their tax rate for library purposes, above the limitations provided by Section 11(b), Article X, within the limits which may be provided by statute.

Section 137.030, supra, particularly that portion of same we have underscored, also authorizes counties or any other political subdivisions, authorized by law to levy a library tax, to increase same above the constitutional tax limitation, in this case as it applies to cities, "in an amount as now or hereafter prescribed by law." Said section nor any of the above mentioned constitutional provisions prescribe that amount of tax, but refers to any applicable statutory provisions.

We have previously called attention to Section 182.140 which prescribes a limitation of two mills library tax which may be voted by cities, and such limitation is in excess of the constitutional limitation of taxes for general purposes, of one dollar on the one hundred dollars assessed valuation.

Section 94.400, RSMo 1959, provides that constitutional charter cities of a certain population may increase their tax rate above the constitutional limitation for general purposes (as to municipalities) for certain special purposes, including libraries. Said section reads in part as follows:

"1. All cities in this state which now have or may hereafter contain a population of not less than ten thousand and less than three hundred thousand inhabitants according to the last preceding federal decennial census, framing and adopting a charter for its own government under the provisions of section 19, article VI of the constitution of this state, known as 'constitutional charter cities', may by city ordinance levy and impose annually for municipal purposes upon all subjects and objects of taxation within their corporate limits a tax which shall not exceed the maximum rate of one dollar on the one hundred dollars assessed valuation, and may by city ordinance levy and impose annually an additional tax at a rate in excess of said one dollar on the one hundred dollars assessed valuation, but not to exceed forty cents on the one hundred dollars assessed valuation for any one or more of the following purposes, to wit: Library, hospital, public

Honorable Paxton P. Price

health, recreation grounds, and museum purposes; provided, however, that the rate of tax levy of one dollar on the one hundred dollars assessed valuation for general municipal purposes may, in addition to the aforesaid rate and purposes of increase which may be voted by city ordinance, be further increased for general municipal purposes for a period not to exceed four years at any one time when such rate and purpose of increase are submitted to a vote of the qualified electors within such cities and two-thirds of the qualified electors voting thereon shall vote therefor, but such increase so voted shall be limited to a maximum rate of taxation not to exceed thirty cents on the one hundred dollars assessed valuation."

While Section 181.060, supra, authorizes state aid when a library tax of not less than one mill shall have been voted in accordance with Sections 182.010 to 182.460, said section also authorizes state aid when a tax is authorized as provided in Section 137.030, RSMo. The tax imposed by city ordinance under Section 94.400 is one authorized in Section 137.030, RSMo, since it is a tax prescribed by law. Compliance with either one or the other methods of authorization of the tax will be sufficient, for obviously the legislative intent was not that compliance with either method of imposing the library tax to the exclusion of the other was intended.

We shall not repeat any of our previous discussion on Section 137.030, supra, except to say that said section does not prescribe the amount or method of authorization the political subdivision shall use in levying a library tax, the effect of its provisions are that the method of authorization and amount of tax shall be in accordance with the applicable law. We have seen that while Section 182.140 permits any city, including a constitutional charter city, to vote a tax for support of its library, Section 94.400 also permits a constitutional charter city, having a population with certain limits, to authorize a library tax of not more than forty cents on the one hundred dollars assessed valuation by city ordinance.

If a constitutional charter city, having a population within the limitation specified in Section 94.400, authorizes a library tax of one mill by city ordinance, which tax has been assessed and levied for the year previous to that in which an application for a state aid grant is made for its library, then such library is eligible to receive a state aid grant in accordance with

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Section 181.060, supra. It is believed these principles are fully applicable to the facts involved in the opinion request, and we shall attempt to apply them as such.

The federal decennial census report for 1960 shows the population of University City to be 51,249. The federal census report for 1950 shows said city to have a population of 39,892. We have not been informed as to the number of years it has been a constitutional charter city, but we have been informed that it was such prior to 1960. It had a population sufficient to meet the population requirements of Section 94.400, supra, of not less than ten thousand and less than three hundred thousand inhabitants according to the last preceding federal decennial census, and had such a population on June 27, 1960 when its city council duly enacted city ordinance, Bill No. 5822, fixing the library tax rate at one mill on the dollar assessed valuation, for the period of 1960-61. The Council was legally authorized by Section 94.400, supra, to enact such ordinance, and the library tax thus authorized by it was a valid tax. Assuming the library tax thus authorized has been assessed and levied for said period of 1960-61, prior to the city's application for a state aid grant to its library, for the period 1961-62, in accordance with that portion of Section 181.060, supra, quoted above, said library is eligible for a state aid grant under provisions of said section.

CONCLUSION

Therefore, it is the opinion of this office that when a constitutional charter city levies and collects a library tax of one mill on the dollar of assessed valuation, imposed by city ordinance under authority of Sections 137.020 and 94.400, RSMo 1959, said tax sufficiently meets the requirements of Section 181.060, RSMo 1959, as to amount, and if the tax has been duly assessed and levied for the year preceding that in which application for a state aid grant is made for its library, such library is eligible for a state aid grant under provisions of said Section 181.060.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC:MM

July 26, 1961



Honorable James R. Reinhard
Prosecuting Attorney, Monroe County
Paris, Missouri

Dear Mr. Reinhard:

You have requested an opinion from this office with respect to the following:

"The County Court of Monroe County has the following problem:--

"In January, 1961, the Monroe County Court was petitioned to dissolve the Stoutsville Special Road District of Monroe County, Missouri; -- On February 21, 1961, the Special Road district was dissolved by a vote of the people residing in the district and a Trustee was appointed by the Court to close the affairs of said road district.

"On March 27, 1961, the Trustee made his final settlement with the Court and the Stoutsville Special Road District is now a part of the County Road District #1.

"In preparing the 1961 County Road Budget, the Court did not foresee the consolidation, therefore, the budget did not contain the anticipated revenue or expenditures of this added territory. We have on hand a balance of \$3,069.12 from this road district, plus anticipated revenue for this year.

"This district, which operated on a levy of 35¢, will now operate on a 60¢ levy under County Road District #1.

"Should the County Budget be amended to include this additional revenue and expenses?"

Honorable James R. Reinhard July 26, 1961

We have obtained additional information from the County Clerk of Monroe County to the effect that the Stoutsville Special Road District was organized in 1920 under the provisions of Sections 10576 to 10610, RSMo 1909. These sections correspond generally with Sections 233.010 to 233.165, RSMo 1959, and the districts formed under these sections are known as city or town road districts.

Section 233.160, RSMo 1959, provides the method for dissolution of such road districts. It provides in part that upon petition of fifty resident taxpayers of the district the county court shall submit the matter of dissolution of the district to the vote of the people, and if a majority of votes upon the proposition are cast for dissolution the district shall be disincorporated and the operation of the law shall cease in said district.

We are unable to find any statutory provisions as to the disposition of the money or the property belonging to such a special road district after its dissolution.

Chapter 137, RSMo 1959, provides in part for the levy of the road and bridge tax for all road districts in the county. Section 137.555 provides for the levy of a thirty-five cent tax on each one hundred dollars evaluation, which tax when collected shall be paid into the county treasury and designated as "the special road and bridge fund", to be used for road and bridge purposes and no other purpose. It further provides that if the tax is levied and collected from property lying within a special road district, four-fifths of the tax collected on the property in the special road district shall be placed to the credit of such special road district in the office of the county treasurer and paid out to such special road districts on proper warrants drawn thereon.

Section 137.560, RSMo 1959, provides that the funds derived under Section 137.555 shall be shown as a separate item on all the financial, budget and other accounting statements of the county and shall be designated as a special road and bridge fund of such county.

Section 50.680, RSMo 1959, deals with the preparation of the county budget by the county court and in part provides for all funds derived from Section 137.555 to be placed in class three of the county budget.

There is no statutory authority for the revision of the budget after it has been prepared by the county court.

The money and the property belonging to the Stoutsville Special Road District came from the taxes provided for under Chapter 137, and such taxes are required by statute to be used only for road and bridge purposes.

Honorable James R. Reinhard July 26, 1961

In Gill vs. Buchanan County, 142 SW 2d 665, the Supreme Court had before it for decision the question of whether or not the fact that the county court of Buchanan County had failed to provide in its budget for the full salaries of the county judges would preclude the recovery of such salaries by the judges. The court said, l.c. 668:

" . . . They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. . ."

It should be observed the decision of the court in the above cited case is based on the fact that the compensation of the judges or the county court is provided for by the statute, and since it is provided for by law it must be considered as being in the budget even though not in fact budgeted.

Since Section 50.680, RSMo 1959, requires all the funds derived from levies made under Section 137.555, supra, to be placed in class three of the budget, it is our opinion that the funds received from the dissolved special road district which the county court did not and could not anticipate receiving at the time the budget was prepared must be considered to be in class three as a matter of law and should be expended as any other funds in class three.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AIR CONDITIONING:
MAGISTRATE COURTS:
COURTS:

The county court cannot be compelled to pay for air conditioning in the courtroom, clerk's office, and judge's chambers of a Magistrate Court.

June 28, 1961



Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Riley:

This department is in receipt of your recent opinion request which reads as follows:

"The County Court has requested me to ask for an opinion on the following question:

"Section 57.090, R.S. Mo., 1959, requires the Sheriff to attend court and to furnish stationery, fuel and other things necessary for the use of the court whenever ordered by the court; and Section 476.270, R.S. Mo., 1959, requires that all expenditures shall be payable out of the treasury of the county.

"Our Magistrate Court has ordered that air conditioning units be installed in (1) the Magistrate Court Room, (2) the Magistrate Clerk's office, and (3) the Magistrate Judge's office.

"Will you please give me your opinion as to whether or not the Magistrate Court is authorized to order such air conditioning equipment installed and require the County Court to pay for same.

"Thanking you in advance, I remain,"

Honorable James T. Riley

We construe the question before us to be whether the county court of Cole County could be compelled to pay for the purchase and installation of air conditioning in the courtroom, clerk's office, and judge's chambers of the Magistrate Court of Cole County.

The applicable statutes read as follows:

Section 57.090-

"To attend courts -- when -- The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Section 476.270 -

"Expenditures of court to be paid out of county treasury -- exception in case of salaries. -- All expenditures accruing in the circuit courts, county courts, magistrate courts, and probate courts, except salaries and clerk hire which is payable by the state, shall be paid out of the treasury of the county in which the court is held in the same manner as other demands."

Under these statutes, the only possible authority for the purchase and installation of air conditioning would be the following phrase of Section 57.090, RSMo 1959:

"* * *it shall be the duty of the officer attending any court to furnish . . . other things necessary for the use of the court whenever ordered by the court."

No Missouri case has construed this phrase; we turn, therefore, to a consideration of the general law dealing with the inherent powers of courts to provide themselves with necessities. The Supreme Court of Missouri discussed this power in the case of *State ex rel Gentry v. Becker*, 351 Mo. 769, 174 SW2d 181 (1943). The question in that case was whether a circuit court of the City of St. Louis had the inherent power to order the city (there in the position of a county) to pay attorney's fees to lawyers appointed by the court to represent the interest of the state in contempt proceedings. The court defined this inherent power as follows (l.c. 351 Mo. 778, 174 SW2d 183):

Honorable James T. Riley

"The courts have the inherent power and authority to incur and order paid all such expenses as are (reasonably) necessary for the holding of court and the administration of the duties of courts of justice.' Schmelzel v. Board of County Commrs. 16 Idaho 32, 35, 100 P. 106, 107, 21 L. R. A., N.S., 199, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226. The limitation on the courts' inherent power is that the expense incurred or the thing done must be reasonably necessary to preserve the courts' existence and protect it in the orderly administration of its business. Annotation Ann. Cas. 1914 A. p. 100."

Following the reasoning of this case, it is our opinion that a **Magistrate Court** cannot require that the County Court pay for air conditioning in the various offices specified in your opinion request.

CONCLUSION

A county court cannot be compelled to pay for air conditioning in the courtroom, clerk's office, and judge's chambers of a Magistrate Court.

The foregoing opinion, which I hereby approve was prepared by my assistant Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EE:ms

DENTAL BOARD:

STATE OFFICERS:

Members of the Missouri Dental Board are state officers within the meaning of the constitutional prohibition against pay raises during current term. S. B. 216 imposes additional duties but manifests no intent that the pay raise effected by S.B. 154 should be compensation therefor.

July 5, 1961



Reuben R. Rhoades, D.D.S.
Secretary, Missouri Dental Board
Central Trust Building
Jefferson City, Missouri

Dear Dr. Rhoades:

We have your letter of recent date which reads as follows:

"Senate Bill No. 216, known as the 'Specialty Law' and Senate Bill No. 154, raising the per diem of the members of the Missouri Dental Board, introduced and passed by the 70th General Assembly, were signed by Governor Blair, and became effective August 29, 1959.

"Senate Bill No. 216 has added many duties, including the giving of additional examinations, to the services rendered by the board members.

"Senate Bill No. 154 repealed Section 332.310 RSMo. 1949, and enacted in lieu thereof one new section to be known as Section 332.310, to read as follows:

'Out of the dental fund the members of the board shall receive as compensation twenty-five dollars for each day actually engaged in the duties as members of the Missouri Dental Board
....'

"The Comptroller of Missouri has advised the Missouri Dental Board that this section would not become effective until each member of our board is reappointed for a new term, regardless of the extra duties imposed by Senate Bill No. 216.

Reuben R. Rhoades

"The Missouri Dental Board feels that it was not the intent of the members of the Legislature to raise the per diem of each member only upon re-appointment, thus discriminating against the remaining members of the board who would continue to receive the old per diem of \$5.00.

"Our board, in session in Kansas City, Missouri, Monday, January 30, 1961, is requesting a written opinion from you concerning the raising of the per diem, as the appropriation bills are now pending before the present session of the Legislature, and we are anxious to include this raise, if, in your opinion, we are entitled to same."

Comparison of the statute which emerged from Senate Bill No. 154, Seventieth General Assembly, and the former Section 332.310 reveals that the sole change with regard to compensation received by board members is the substitution of the words "twenty-five dollars" for the words "five dollars". Both the old and the new section provide the amount specified therein should be paid to the members "for each day actually engaged in the duties as members of the Missouri Dental Board". No reference is made in the revised version of 332.310 to any new or additional duties, though some were assigned by the enactment of Senate Bill No. 216, Seventieth General Assembly.

Senate Bill No. 216 repealed former Section 332.030 and re-enacted it adding another paragraph which permits the board to require additional qualifications of any licensee who specializes in a particular area of dentistry. Senate Bill 216 also brought into existence four new sections (332.062, 332.064, 332.066, 332.069) which set out the requisite qualifications of those who may be certified as specialists without examination, require all other licensed dentists to take an examination prior to certification, provide for the appointment of a board of examiners in the various specialties to monitor the qualifications of the examinees as well as to originate and conduct the examinations. The new sections also set out the fees related to the various steps of certification, examination, renewal, compensation of examiners, etc.

Senate Bill 216 also amended Section 332.160. These revisions were minor and obviously directed at harmonizing that section with the newly created ones.

Your inquiry as to whether the members of the board are entitled to the increased compensation provided for in the amended Section 332.310 places the following questions before us: Are

the members of the Board state officers within the meaning of Section 13, Article VII of the 1945 Constitution; if so, does the additional twenty-dollars per day provided for in the amended form of the cited statute amount to an "increase" as prohibited by Section 13, Article VII of the 1945 Constitution?

That section of the Constitution provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In 1933, members of the State Board of Health were held to be state officers within the meaning of the constitutional provision which gave the Supreme Court jurisdiction in cases where any state officer was a party. *State v. State Board of Health* (Mo. Sup. 1933) 65 SW2d 943. However, the issue upon which that determination was made was entirely different from the one presented by the instant case. For that reason, we will examine the cases where the ingredients of state officer status were discussed with relation to Section 13, Article VII of the 1945 Constitution.

The most recent case in which this subject was extensively discussed is *State ex rel. Webb v. Pigg*, (Mo. Sup. 1952) 249 SW 2d 435, an original proceeding in mandamus brought by the clerk of the Springfield Court of Appeals to compel payment of a pay raise awarded him by that court during his term of office. The principal issue was whether the clerk was a "state officer" within the meaning of the constitutional provision with which we are here concerned.

After a thorough examination of the law on this subject, our Supreme Court held that the clerk was not a "state officer" and thus could receive the pay raise during his current term. In arriving at that determination the court said, l.c. 437-438:

* * *"[1] This court has questioned the possibility of specifically defining the words, 'public office', 'public officer', or 'state officer', but it has determined each case involving the matter in question in view of the particular facts presented and the applicable statutes and constitutional provisions. Among the matters taken into consideration are the duties to be performed, the method of performance, the end to be attained, the powers granted and, generally, the surrounding circumstances. These circumstances include tenure, oath, bond, official designation, compensation and the dignity of the position in question, but no particular fact or circumstance is

considered to be conclusive. (Citing cases).

"In the case of State ex rel. Walker v. Bus, 135 Mo. 325, 331, 36 SW 636, 637, 33 L.R.A. 616, the court said: 'A public office is defined to be "the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off. 1. The individual who is invested with the authority and is required to perform the duties is a public officer.' And see State ex rel. Zevely v. Hackmann, 300 Mo. 59, 254 SW 53, 55; State ex inf. McKittrick v. Whittle, 333 Mo. 705, 63 SW 2d 100, 102. This definition has been somewhat modified by the subsequent decisions of this court.

"[2] The parties to this action in effect concede that, under the more recent decisions of this court, a different test has been formulated and applied in reaching a conclusion as to whether or not a particular official is a 'state officer' within the meaning of the quoted constitutional provision. In order to be considered a 'state officer' within the purpose and meaning of said constitutional provision, the official in question must have been delegated a portion of the sovereign power of government to be exercised for the benefit of the public and such delegation of sovereign power must be 'substantial and independently exercised with some continuity and without control of a superior power other than the law.' (Citing cases).

"[3] In considering the meaning of the term 'sovereign power', and as illustrative thereof, this court has repeatedly quoted from the case of State ex rel. Landis v. Board of Commissioners of Butler County, 95 Ohio St., 157, 115 N.E. 919, 920, as follows: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous

cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.' (Citing cases).

"[4] Whether or not relator has been delegated any portion of the sovereign functions of government within the afore-said definition and the extent to which he has been invested with such 'sovereign power' to be exercised by him for the benefit of the public, independently and without control of a superior power other than the law, can be ascertained only by a careful review of the applicable statutory and constitutional provisions."

Summing up its position, the Court said, l.c. 441:

"In recent opinions of this court special emphasis has been placed upon whether the particular individual in question performs his duties independently and without control of a superior power other than the law, that is, whether he is endowed by law with the power and authority to use his own judgment and discretion in discharging the sovereign functions of government which have been vested in him by statute and which functions are to be exercised by him for the benefit of the public."

In *State ex rel. Scobee v. Meriwether*, (Mo. Sup. 1947) 200 SW 2d 340, wherein a court reporter was held not to be a "state officer" as contemplated by Section 13, Article VII of the 1945 Constitution, the court en banc quoted with approval the following from *Pickett v. Truman*, 64 SW 2d 105, 106:

* * * "[1] Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive."

Another criterion also employed in many cases in this area is whether the duties of the office in question "are co-extensive with the boundaries of the state." *State ex rel. Holmes v.*

Dillon, (Mo. Sup. 1886) 2 SW 2d 417, 419; State ex rel. Rucker v. Hoffman, (Mo. Sup. 1926) 288 SW 16, 17; State ex rel. Kirks v. Allen (Mo. Sup. 1952) 250 SW 2d 348, 350.

Independence in the exercise of some part of the sovereign power as a measure of officer status seems to be the element which appears most frequently in cases on this subject; and, perhaps, provides the firmest foundation on which a judgment can be rendered. Indeed, the other criteria - taking of an oath, posting of a bond, continuing nature of duties - all seem incidental to this test inasmuch as they simply tend to reflect the presence or absence of such freedom within a particular area. In State ex inf. McKittrick v. Bode, (Mo. Sup. 1938) 113 SW 2d 805, 806, the Court said: "It is not possible to define the words 'public office or public officer'," yet in the same paragraph the court observed "it is not necessary that all criteria be present in all cases. For instance, tenure, oath, bond official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered."

Discussing the quoted portion of the Bode case in a subsequent opinion, Kirby v. Nolte, (Mo. Sup. 1942) 164 SW 2d 1, the court en banc characterized the definition of public officer as "rather vague" and continued, l.c. 8: "But the definition is clear and satisfying if to it the further requirements be added, that such power must be substantial and independently exercised with some continuity and without control of a superior power other than the law."

Section 332.290, RSMo 1959, provides that after the running of the initial terms of those appointed to the Missouri Dental Board "all members shall be appointed for terms of five years each," that the Board "shall provide and maintain for itself a seal," for authenticating documents and that "All courts shall take judicial notice of said seal." Section 332.300 requires a bond of the secretary-treasurer of the board. Other duties and powers of the board include issuance of licenses to and registration of persons qualified to practice dentistry, 332.020; accreditation of dental colleges, 332.030, 332.090; preparation and conducting of qualifying examinations for those desiring to enter the general practice of dentistry as well as for specialists 332.050, 332.030; convening of hearings and the power to suspend or revoke licenses for cause, 332.160, 332.180; issuance of subpoenas to compel attendance at such hearings, 332.340; inspection of any dental office and investigation of any violation of the dental laws, 332.350. The board has similar powers and duties with respect to the regulation of dental hygienists, 332.400 through 332.580.

Legislative control of the practice of medicine in Missouri has recently been scrutinized judicially in several "naturopath" cases and held to be a valid exercise of the sovereign power. In *State ex rel. Collet v. Scopel*, (Mo. Sup. 1958) 316 SW 2d 515, a petition for an injunction prohibiting the unlicensed practice of medicine by a naturopath was dismissed in the trial court. The Supreme Court remanded the case with directions that the naturopath be permanently enjoined, stating, l.c. 518: "It is clear that for protection of the public health and welfare, the legislature is empowered to regulate the practice of medicine in such manner as it reasonably may believe to be proper and wise."

In a case which was factually very similar to *Scopel*, the Supreme Court again ordered a permanent injunction against a naturopath who contended that legislative regulation of naturopathy violated the Fourteenth Amendment of the United States Constitution in that it deprived him of the inalienable right to follow a common occupation. In confirming the state's authority to dictate the qualifications of those who would treat the infirm, the Court said, "Medical practice acts are upheld as valid exercises of the police power for the protection of the public health and safety." *State ex rel. Collet v. Errington*, (Mo. Sup. 1958) 317 SW 2d 326, 330; *Certiorari denied*, 79 S. Ct. 1122, 359 U.S. 992, 3 L. Ed. 980.

The *Scopel* and *Errington* cases unequivocally establish the existence of sovereign power in the control of the practice of medicine, and, by analogy, in the practice of dentistry. That power to regulate the practice of dentistry in Missouri has been delegated in part to the Missouri Dental Board is obvious from the statutes creating and empowering the board.

In view of the powers and functions of the board, there can be little doubt that the members of the board are "state officers" within the meaning of Section 13, Article VII. The members have tenure, official designation, compensation, and dignity inherent in membership in such a body. Its powers are "co-extensive with the boundaries of the state" and are exercised "without control of a superior power other than the law." The board, to paraphrase *State ex rel. Webb v. Figg*, supra, has authority to exercise its judgment and discretion in discharging the sovereign functions of government which have been vested in it by statute and which functions are exercised by it for the benefit of the public. In short, the members of the board enjoy every significant characteristic of state officer status as defined by the courts of this state.

It is now necessary to inquire whether the new per diem rate is an increase of the type prohibited by Section 13, Article VII, of the 1945 Constitution, for "There can be no doubt but that the legislature may award extra compensation to an incumbent for the

performance of certain newly imposed duties without violating the constitutional inhibition under consideration." *Mooney v. County of St. Louis*, (Mo. Sup. 1956) 286 SW 2d 763, 766. The new statutory sections emerging from Senate Bill No. 216 unquestionably impose additional duties on the board, but the concurrently re-enacted Section 332.310 does not relate these duties to the raise in per diem.

In *Mooney v. County of St. Louis* supra, an almost identical factual situation existed. The plaintiffs therein were all former members of the St. Louis County Board of Election Commissioners who were attempting to collect additional salary for a certain period. During their term of office, the Missouri Legislature had voted an increase in their salaries and had concurrently passed another bill which substantially increased the duties of the board by raising from nine to fifteen the number of cities under the board's jurisdiction. As in the instant case, both bills became law on the same date but the increase in salary was not denominated in either bill as compensation for the additional duties.

It was conceded by the plaintiff board members that they were "'officers' as would come within the scope of the constitutional prohibition * * * l.c. 765. This left as the principal issue whether the legislature intended the increase in pay as compensation for the added duties. On this subject, the Court said, l.c. 766:

"[5-6] * * * At every session of the legislature laws are enacted which affect the duties of many state and county officers. The mere fact that such legislation may result in an increase in the work and responsibility of an officer does not entitle him to claim additional compensation. We must assume that the members of the General Assembly were fully cognizant of the instant constitutional limitation. In all of the cases we have examined in which an increase during the term of office has been upheld, the legislature, in the Act creating the additional duties, has specifically provided that the extra compensation was for the performance of those duties. We do not intend to say that this is the only method of proving the legislative intent, but it certainly is the most satisfactory and conclusive proof and apparently is the customary method of legislative expression. * * *

Speaking of the two bills, the Court observed, l.c. 767, 768. "The most that can be said is that they both dealt with the same general subject in that they each related to the St. Louis County

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Board of Election Commissioners and were enacted at the same session of the General Assembly. This, we are convinced, is not sufficient to support the judgment" for the plaintiffs below.

Inasmuch as there is no more in the instant case indicative of legislative intent to provide compensation for the additional duties than there was in the Mooney case, we must conclude, as the Court did, that no such intention existed and that the increase in per diem salary herein is prohibited during the terms of those serving when the increase became law.

CONCLUSION

It is the opinion of this office that the increase in the per diem salary of the members of the Missouri Dental Board effected by Senate Bill No. 154, Seventieth General Assembly, may benefit only the members of the board who were or will be appointed subsequent to August 29, 1959, the effective date of the bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:BJ

COUNTY COLLECTORS:

COUNTY COURT:

SURETY BOND:

COLLECTOR'S BOND:

When county consents to giving of surety bond by county collector, county must pay premiums on such bond coming due during entire term of collector.

August 21, 1961



Honorable John M. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This is in answer to your letter dated March 29, 1961, requesting an opinion of this office, which request reads as follows:

"Mr. Curtis Green, our county collector, and Don Snyder, who is currently with a group of auditors who are working in Newton County auditing the records of county officers, mentioned to you at Springfield the situation concerning the collector's bond; and I am writing this letter to request your official opinion on such a situation and to set out the facts involved.

"When the present county collector, Mr. Curtis Green, was elected to office in 1958 he secured a surety bond in the amount of \$180,411.38 from the United States Fidelity and Guaranty Company written for a term of four years. This bond was approved by the court and the court agreed to pay the premium on the bond. I am enclosing herewith a photostat copy of the court's minutes. The county paid the premium of \$1,152.06 for two years. On January 7, 1961 the present county court refused to pay the premium for the current year.

"The premium on these bonds can be paid in advance for the four year term at a

Honorable John M. Rice

substantial reduction in premium, or can be paid annually; however, in either case the bond is written for the full four year term. We request your opinion as to whether or not the county is obligated under the above facts to pay the premium on the collector's bond for the remaining two years of his office.

"I have read an opinion from the office of the Attorney General dated January 11, 1940 written to Henry Lamkin, Prosecuting Attorney of Callaway County, Missouri, and an opinion dated December 20, 1937 addressed to Mr. Conn Withers, Prosecuting Attorney, Clay County, Missouri, and an opinion dated April 16, 1956 addressed to Mr. Joe Collins, Prosecuting Attorney, Cedar County, Missouri; all of which opinions indicate that the county is liable for the payment of such bond premium. I have also read an opinion dated June 20, 1951 addressed to Hon. John Downs, Prosecuting Attorney, Buchanan County, Missouri, which holds the court is not authorized to budget and pay the premium of the county collector's bond for a period beyond the current year. I am calling these opinions to your attention since it would appear that there is some conflict and we would very much appreciate your current opinion on our situation."

In addition, you have furnished a copy of the Newton County Court record dated February 6, 1959, which reads as follows:

"In the matter of J. Curtis Green, County Collector, -Bond for 'Collector of Revenue' approved unanimously by the Court. In the matter of J. Curtis Green, payment of the Bond, approved by O. M. Prater, presiding Judge, and Lewis Cope, Western Judge, and rejected by V. H. Hardy, Eastern Judge."

The question presented, therefore, is: After the county court has approved the county collector's surety bond and paid the premium for two years, is it then obligated to pay the premiums on the bond for the last two years of the county collector's term.

Honorable John M. Rice

Section 107.070, RSMo 1959, provides as follows:

"Whenever * * * any officer of any county of this state * * * shall be required by law of this state * * * or by any order of any court in this state, to enter into any official bond * * * he may elect, with the consent and approval of the governing body of such * * * county * * * to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

The order of the county court of February 6, 1959, above referred to, shows that the bond of the county collector received the "consent and approval" of the county court. The statute further provides that "such surety bond shall be paid by the public body protected thereby."

The plain words of the statute are reinforced by the language of the Supreme Court in *Motley v. Callaway County*, 347 Mo. 1018, 149 SW2d 875, 1.c. 877:

"So when consent and approval for the officer to purchase such a bond at public expense was given in advance by 'the public body protected,' it was required to pay the cost."

The court, further on in the opinion, said, 1.c. 877:

"The 1937 Act only authorized the county to make an agreement for this type of bond, and, if it did so in advance, to pay for it when it was furnished."

It therefore appears clear from the statute and the *Motley* case construing it that the county is obligated to pay the premium on the bond. The *Motley* case, however, does not expressly consider the effect of the county budget law under Chapter 50, RSMo 1959, or constitutional provisions relating thereto. It therefore appears that to fully answer your inquiry those elements must be considered.

Honorable John M. Rice

Section 26(a) of Article VI of the Constitution of Missouri, 1945, provides:

"No county * * * shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years * * *."

It is therefore apparent that with relation to your problem the question then presented is whether or not the liability for the bond premium is an indebtedness within the meaning of the constitutional prohibition of Section 26(a) of Article VI of the Constitution. A number of cases in Missouri have established the principle that where a contract is wholly executory and the pecuniary liability does not become fixed until the service has been rendered from month to month or year to year, then there is no "indebtedness" within the meaning of the above-mentioned constitutional provision. This principle is established by *Saleno v. City of Neosho*, 127 Mo. 627, 30 SW 190; *Tate v. School Dist. No. 11 of Gentry County*, 23 SW2d 1013, 1023. The Supreme Court, in *Kansas City Power and Light Co. v. Town of Carrollton*, 142 SW2d 849, 1.c. 853, explained the rule above referred to in the following language:

"What those cases do hold is that such an installment contract does not create a debt for the aggregate sum which may become due over the whole duration of the contract. In other words, such a contract does not contravene said section of the Constitution, even though the aggregate installments exceed five per cent of taxable property, unless one or more of the yearly installments exceeds the yearly revenue. But each installment becomes a debt as it falls due and, if it exceeds the revenue provided for the year in which it falls due, there is no way in which it can be paid except by a levy under said Section 12."

Under this doctrine, where the county collector might vacate his office or die, the bond premium would not be earned by the bonding company, and hence would not become a debt within the meaning of the Constitution until it had actually been earned. Therefore,

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the payment of the bond premium for the year 1961 would not violate the prohibition against "indebtedness" within the meaning of Section 26(a) of Article VI of the Constitution of Missouri.

It therefore appears that the Newton County Court did both approve and consent to the county collector's bond, and consequently the county is liable for the payments of the annual installments of the bond premium on the county collector's bond under Section 107.070, supra.

Respecting your inquiry concerning prior opinions of this office, we wish to advise you that the opinions dated June 20, 1951 to Honorable John E. Downs, and January 12, 1948 to Honorable Ralph Baird, are withdrawn.

CONCLUSION

It is the opinion of this department that Newton County is liable for the payment of the annual premiums on the surety bond of the County Collector of Newton County for the remaining two years of his term.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

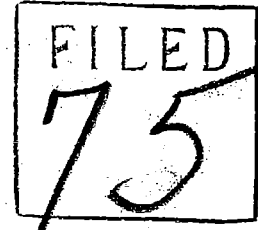
Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

OPINION NO. 451 ANSWERED BY LETTER

December 8, 1961



Honorable John M. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Rice:

This is in further reply to your letter of November 30, 1961, relating to the amount which the State may pay for employees of the Magistrate Court of Newton County.

The opinion of this office dated February 14, 1961, written by Mr. Jerry B. Buxton, ruled that there was no present vacancy in the office of Magistrate of Newton County. The language contained on page 7 of the opinion which you quote, "We feel that in this situation the probate judge, ex officio magistrate, is elected for the term provided by law, four years, and the change in status of the county would not affect the office during that term", must be read in the light of the question ruled. The obvious meaning of this language is simply that the change in population does not operate to create an automatic vacancy in the office. The opinion did not consider any question relating to the compensation payable to the clerical employees of the Court nor for that matter the compensation payable to the judge.

The liability of the state for clerical hire is created by statute, and the comptroller has no authority to make any payments for such purpose without statutory authorization. In all other counties of the state, the Comptroller determines the amount payable for clerical hire in magistrate courts on the basis of the 1960 census. There is no authority for the Comptroller to pay the Clerk of the Magistrate Court of Newton County on the basis of the 1950 census which has been superseded by the 1960 census.

Paragraph 6, Section 483.490, RSMo 1959, both before and after the amendment thereof effective October 13, 1961, is expressly limited to counties having a population not in excess of 30,000. On the other hand, paragraph 7 of said Section expressly applies to counties having a population in excess of 30,000 but not more than 40,000 inhabitants. No doubt the Legislature did not contemplate the existing situation, but the law as written must govern. We find no provision in the statute which would authorize payment for clerical hire in Newton County on any basis other than as set forth in paragraph 7 of Section 483.490, taking into account, of course, the increase effective October 13, 1961. Neither this office nor the Comptroller can ignore the fact that the population of Newton County has changed, and that said population is now in excess of 30,000. Under the circumstances, the amount which the state is authorized to pay for clerical hire in the Magistrate Court of Newton County is limited by the provisions of Paragraph 7, Section 483.490. We have so advised the Comptroller.

Yours truly,

THOMAS F. EAGLETON
Attorney General

CEMETERIES, PUBLIC AND
PRIVATE:
TRUST FUNDS:
ADMINISTRATION OF:

1. For keeping book on all receipts, disbursements and management of seven trust funds for maintenance of public and private cemeteries, under Sec. 214.180, RSMo 1959, County Clerk cannot be compensated from trust funds.

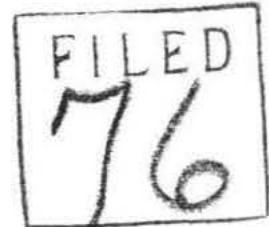
2. It is County's responsibility to pay for County Clerk's record book. 3. County Treasurer cannot be compensated for booking services on four of trust funds, services pure

ly voluntary, no part of official duties. 4. Trustees' annual report, required by Sec. 214.150, RSMo 1959, shall be prepared by County Clerk and filed by trustees. County Clerk and County Court cannot be paid compensation for preparation and filing of report. 5. When requested, Prosecuting Attorney shall advise County Court on all legal questions arising in connection with preparation of trustees' annual report. Not Prosecuting Attorney's official duty to prepare report. He cannot be compensated for advice to Court in addition to statutory salary.

July 14, 1961

Honorable Clarence A. Roberts
Representative, Andrew County
Rea, Missouri

Dear Mr. Roberts:



This office is in receipt of your request for a legal opinion, which reads as follows:

"During the past several years in Andrew County there has been established 7 perpetual trust funds for the care and upkeep of various cemeteries in Andrew County, Missouri. These have been established under the provisions of Chapter 214 of the Revised Statutes of Missouri, 1959. There are also some other people desirous of creating new trusts but are concerned with the administration procedure on such trusts. All of these trusts designate the County Court as Trustees and charge them with the administration of said trusts and require them to file an annual trustees report in Circuit Court. The following are the questions which I would like to have answered.

"1. Section 214.180 states that the Clerk of the Court shall keep in a separate record book all receipts and disbursements of each and

Honorable Clarence A. Roberts

every trust fund or funds and a detailed account of the management of the same. In complying with this section is the Clerk entitled to compensation from the Trust fund? Who is responsible for the payment of the book purchased for the keeping of such records? Is this an obligation to be prorated among the trust funds or is it a charge against the County?

"2. At the present time the County Treasurer is paid a yearly bookkeeping salary on four of these trusts. Is the County Treasurer entitled to compensation for this service or is this a duty imposed upon him by virtue of his being County Treasurer? If the County Treasurer refuses to accept the trust fund monies unless he is compensated for his service then who can legally accept and deposit said money?

"3. At the present time the Prosecuting Attorney prepares the annual Trustees Report and files the same in Circuit Court. In the past he has been allowed a fee for his service. Due to the fact that the County Court is designated as trustees and are the responsible parties for the administration of the trust would it be legal for the County Clerk to prepare the Trustees Report and file the same in Circuit Court? If the Court asks the Prosecuting Attorney to prepare the report would this be considered a duty of the Prosecuting Attorney as legal adviser for County officials rather than an act of private employment?"

All statutory references herein are to RSMo 1959, unless otherwise shown.

Section 214.150 provides that the county courts of the respective counties shall become trustees of trust funds created for the purpose of maintaining in part or in whole public or private cemeteries in their respective counties and reads as follows:

"The county courts of the respective counties of this state shall become trustees and custodians of any fund or funds which may be created by any person or persons, firm or corporation,

Honorable Clarence A. Roberts

for the purpose of maintaining in part or in whole any public or private cemetery in their respective county. When a gift or bequest is made to said county court they shall accept the same upon the terms and conditions of said gift or bequest and administer said trust fund as herein provided and make report to the circuit court annually showing in detail the manner in which said trust fund or funds have been managed."

For the purposes of our present discussion it will be assumed that Section 214.150, supra, has been complied with, and that the County Court of Andrew County legally became the trustees of the seven trust funds donated for the purpose of maintaining the public and private cemeteries of the county, referred to in above quoted opinion request. In becoming trustees and accepting the custody of said trust funds the County Court acted in an official capacity, and not as private citizens.

Section 214.160 provides the County Court shall invest or loan the trust funds only in the manner therein provided. Said section reads as follows:

"The county court shall invest or loan said trust fund or funds only in United States government, state, county or municipal bonds, or first real estate mortgages or deeds of trust. They shall use the net income from said trust fund or funds or so much thereof as is necessary to support and maintain and beautify any public or private cemetery or any particular part thereof which may be designated by the person, persons or firm or association making said gift or bequest. In maintaining or supporting the cemetery or any particular part or portion thereof the court shall as nearly as possible follow the expressed wishes of the creator of said trust fund."

Section 214.180 imposes the duty of keeping a record of all receipts and disbursements and a detailed account of the management of the trust funds, upon the County Clerk. Said section reads as follows:

Honorable Clarence A. Roberts

"The clerk of the court shall keep in a separate record book all receipts and disbursements of each and every trust fund or funds and a detailed account of the management of the same."

The first question of the first inquiry of the opinion request is concerned with the above quoted section, and asks:

"In complying with this section is the clerk entitled to compensation from the trust fund?"

We understand the "complying with this section" of the question was intended to refer to the duties of the County Clerk in keeping the record book set out by Section 214.180, supra.

The County Clerk can be paid compensation for his services in performing said statutory duties only in such instances when the trust instruments so provide, some statute authorizes the payment of compensation to the Clerk, from the trust funds involved, or a statute provides such compensation shall be paid from a certain type or class of county funds.

No mention is made in the opinion request of any provisions of the trust instruments providing that compensation shall be paid to the county clerk for performance of his record-keeping duties, in connection with the trusts, from the trust funds, and it will be assumed the trust instruments do not contain any provisions of this nature.

In this connection, attention is called, to the general rule prevailing in Missouri, to the effect, that no compensation can be paid to a public official for performance of duties required of him by law unless a statute provides for payment to him of such compensation. In the absence of a statute authorizing such payment, the officer's services are deemed to be gratuitous. In the case of Nodaway County v. Kidder, 129 SW 2d 857, the court stated this general rule and held it to be applicable to a factual situation involved in the case. At l.c. 860 the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that

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manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656."

This general rule is fully applicable to the facts involved in the present inquiry, and in view of the further factual situation no Missouri statute provides that the County Clerk shall be compensated for performing the duties imposed upon him by Section 214.180, supra, from the trust funds, or from any type or class of county revenue, no compensation can be paid to him.

In answer to the first question of the first inquiry, it is our thought, that for performance of the duties imposed upon him by Section 214.180, supra, the County Clerk is not entitled to, and cannot be paid compensation for his services from any of the trust funds.

The second question of the first inquiry is:

"Who is responsible for the payment of the book purchased for keeping of such records?"

Section 49.510 provides that the county shall provide offices, where the county officers may properly perform the duties of their respective offices, and the county shall equip such offices. Said section reads as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

The keeping of a record book on the trust funds, as referred to in Section 214.180, is one of the official duties of the county clerk, and obviously the book would be "necessary stationery,

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supplies, equipment * * *, " within the meaning of Section 49.510, which the county shall provide for the county clerk. Certainly the clerk could not perform the record-keeping duties on the trust funds, required of him without the record book, consequently, the county court shall furnish such a book to the clerk, at county expense.

Therefore, our answer to the second question of the first inquiry is that it is the responsibility of the county to pay the cost of the county clerk's record book.

The second inquiry informs us that at the present time the County Treasurer is paid a yearly bookkeeping salary on four of these trusts. The facts given are very meager, and it is not clear as to the exact kind of bookkeeping service the treasurer does perform. We are uninformed as to why the Treasurer is keeping books on any of the trust funds. The keeping of records by the treasurer is not only unnecessary, but it is a duplication of the records required to be kept by the county clerk, under provisions of Section 214.180, requiring the clerk to keep the necessary records on every trust fund of this class. The trust funds are not county funds of which the treasurer has custody and must keep records.

No Missouri Statutes impose the duty of keeping any records on trust funds of this class upon a county treasurer, no Missouri statutes fix the amount of compensation he shall receive if he does perform such services, from either the trust funds or from the county, and in the absence of such statutes the County Treasurer cannot be paid any compensation for bookkeeping services on the four trusts.

Therefore, our answer to the first question of the second inquiry is that the county treasurer is not entitled to be paid compensation for performance of bookkeeping services on the four trust funds. The bookkeeping services are purely voluntary on his part and they are no part of his official duties.

The second question of the second inquiry reads:

"If the County Treasurer refuses to accept the trust fund monies unless he is compensated for his service then who can legally accept and deposit said money?"

In discussing the preceding question we pointed out the county treasurer has no duties to perform with reference to the keeping of the accounts of the four trust funds and could not

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be compensated for performance of the bookkeeping services. By statute, the county court has been named the legal custodians of all trust funds of this class. They are without legal authority whatsoever to attempt to delegate their statutory duties to others, such as turning over custody of any trust funds to the treasurer at any time, for any purpose.

In the event the county court should have any uninvested trust funds, or undisposed trust income, or both, it is believed they might legally deposit same, temporarily, in a bank as trustees, in a separate account for each trust fund, until such time as the principal of each trust might be invested or loaned, in accordance with the provisions of Section 214.160, supra, or any income is needed to maintain a specified cemetery, or cemeteries.

In view of the foregoing, it is believed that no question actually arises with regard to the refusal of the county treasurer to accept trust fund monies unless he is compensated for bookkeeping services on the four trust funds, and no answer will be given to that question.

The third inquiry reads as follows:

"At the present time the Prosecuting Attorney prepares the annual Trustees Report and files same in Circuit Court. In the past he has been allowed a fee for his service. Due to the fact that the County Court is designated as trustees and are the responsible parties for the administration of the trust would it be legal for the County Clerk to prepare the Trustees Report and file the same in Circuit Court?"

Section 214.150, supra, provides the county court shall make the report, annually, to the circuit court, and reads in part as follows:

"* * * and make report to the circuit court annually showing in detail the manner in which said trust fund or funds have been managed."

The report referred to in the first question of the third inquiry is the same one mentioned in that portion of Section 214.150, supra, quoted above. Said report is that of the trustees and must be filed in circuit court by them, and not by the county clerk or the prosecuting attorney.

While no statute expressly provides that the county clerk shall prepare the trustees' annual report, it is the statutory

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duty of the county clerk to keep the records of the county court. We have previously noticed that it is the clerk's duty to keep a record book on the cemetery trust funds, under provisions of Section 214.180. It is believed that as official record keeper of the trust funds, the clerk would not only be more familiar with, and in a better position to prepare the report for the county court, than any other person but that it is the incidental duty of the clerk to prepare the report for the county court. In so doing the clerk is not entitled to compensation, in the absence of a statute authorizing payment of compensation to him.

Therefore, in answer to the first question of the third inquiry, it is our thought that it is the duty of the county clerk to prepare the annual report on the management of the cemetery trust funds, but said report shall be filed in circuit court by the trustees. The clerk cannot be paid compensation for the preparation of said report.

The second question of the third inquiry asks:

"If the Court asks the Prosecuting Attorney to prepare the report would this be considered a duty of the Prosecuting Attorney as legal advisor for County officers rather than an act of private employment."

Section 56.070, gives the general duties of the prosecuting attorney, and reads in part as follows:

"The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. He shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court or any judge thereof, except in ~~incorporated~~ counties in which there is a county counselor * * *." (Underscoring ours.)

Because of the statutory duties of the county court as trustees of the cemetery trust funds, and the maintenance of public and private cemeteries of the county from the trust funds, for the benefit of the general public, it is believed this is a matter in which the county is interested, within the meaning of that portion of Section 56.070, quoted above.

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Therefore, it follows that whenever the county court requests advice of the prosecuting attorney on any legal question pertaining to the trust funds, or in regard to the preparation of the trustees' annual report of the management of such funds to the circuit court, it is the official duty of the prosecuting attorney to furnish the advice requested. The furnishing of said advice does not include the preparation of the report, as it is the duty of the county clerk, and not that of the prosecuting attorney to prepare such report. In the event the prosecuting attorney does furnish legal advice to the county court in this particular, or if the prosecuting attorney should voluntarily prepare the trustees' report for the county court, he cannot be compensated therefor in addition to the salary he is entitled to receive, under the applicable statute as prosecuting attorney.

In this connection, it should also be borne in mind that the county court cannot be paid any compensation for their services in connection with the preparation and filing of the report.

For answer to the second question of the third inquiry it is our thought that, when he is requested by the county court, it is the official duty of the prosecuting attorney to advise the court on all legal questions pertaining to the cemetery trust funds, or on those questions arising in connection with the preparation of the trustees' annual report on said trust funds, but it is not the duty of the prosecuting attorney to prepare such report for the county court. The prosecuting attorney cannot be compensated for his advice to the county court in this matter, in addition to the salary he is entitled to receive under the applicable statute, as prosecuting attorney.

CONCLUSION

Therefore, it is the opinion of this office that when members of a County Court are trustees of seven trust funds created for the purpose of maintaining in part or in whole, public and private cemeteries, under provisions of Sections 214.150, 214.160 and 214.170, RSMo 1959, that:

1. For keeping a book with a record of all receipts, disbursements, and a detailed account of the management of the seven trust funds, as required by Section 214.180, RSMo 1959, the County Clerk cannot be paid compensation for his services from any of said trust funds.

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2. It is the responsibility of the county to pay the cost of the County Clerk's record book.

3. The County Treasurer cannot be paid compensation for performance of bookkeeping services on four of the trust funds. Said services are purely voluntary and they are no part of his official duties.

4. The annual report of the management of the trust funds, by the trustees, required by Section 214.150, RSMo 1959, shall be prepared by the County Clerk and filed in Circuit Court by the trustees. The County Clerk cannot be paid compensation for his services in preparing said report. The County Court cannot be paid compensation for their services in connection with the preparation and filing of such report.

5. When requested by the County Court, it is the official duty of the Prosecuting Attorney to advise the Court on all legal questions arising in connection with the preparation of the trustees' annual report on the management of the trust funds, but it is not the official duty of the prosecuting attorney to prepare the report for the trustees. He cannot be paid compensation for the legal advice thus given to the Court, in addition to the salary he is entitled to receive as prosecuting attorney, under the applicable statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

PNC:aa:gm

LICENSES: A resident of Missouri who operates a
CHAUFFEUR'S LICENSES: vehicle as a chauffeur on the highways
of Missouri must obtain a Missouri
MOTOR VEHICLES : chauffeur's license even though he may
be properly licensed by another state.

September 27, 1961



Honorable Forrest G. Roberts
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

We are in receipt of your request for an opinion of
this office, which request reads as follows:

"QUESTION: Does a Missouri resident
chauffeur need a Missouri chauffeur's
license to drive his employer's vehicle
on Missouri highways, if he is employed
by a Kansas firm and has the proper
Kansas chauffeur's license required of
outstate persons?"

The statutory provision requiring a chauffeur's license
in Missouri is found in Section 302.020(1), RSMo 1959, as
follows:

"It shall be unlawful for any person to:

(1) Drive as a chauffeur any vehicle
upon any highway in this state unless
such person has a valid license as a
chauffeur under the provisions of this
chapter, or to

* * * *

The exceptions to this requirement are contained in
Section 302.080, RSMo 1959, the applicable portion of which
is as follows:

Honorable Forrest G. Roberts

"The following persons are exempt from license hereunder:

* * * *

(3) A nonresident who is at least eighteen years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur, except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state."

While no Missouri cases have been found on the point of which you inquire, it seems clear that there is no exemption provided by Section 302.080(3) for a resident of Missouri driving a vehicle on Missouri highways as a chauffeur. That the chauffeur in question has a Kansas license does not bear upon the application of Section 302.020(1). That section makes it mandatory for all persons to have a valid license under Missouri law in order to drive as a chauffeur on Missouri highways. The validity of a license issued in a state other than Missouri is recognized by Section 302.080(3), but only to the extent that it is used by a nonresident of Missouri. Since there does not appear to be any question but that the chauffeur involved is a resident of Missouri, the conclusion is inescapable that, in order to be properly licensed according to the terms of Chapter 302, he must have a Missouri license.

It might be noted that the Kansas law regarding the licensing of chauffeurs and the exemption therefrom is substantially equivalent to the above-quoted Missouri provisions. Included in the Kansas statute (§8-236, G.S. Kans. 1959 Supp.) is the proviso in the exemption granted nonresidents to the effect that anyone employed by a Kansas resident must obtain a Kansas license. The situation of which you inquire is the result of this requirement. The individual in question is employed by a Kansas firm and thus required to obtain a Kansas chauffeur's license though not a resident of Kansas. At the same time, he has occasion to drive as a chauffeur on Missouri highways and, being a Missouri resident, he is also required

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to have a Missouri license. Nowhere in Chapter 302, however, is provision made for an exemption from the licensing requirement for a Missouri resident solely on the ground that he is required by the laws of another state to obtain a license in that state.

CONCLUSION

In view of the foregoing, it is the opinion of this office that a resident of Missouri who operates a vehicle as a chauffeur on the highways of Missouri must obtain a Missouri chauffeur's license even though he may be properly licensed by another state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

CITIES:
TOWNS AND VILLAGES:
CONSOLIDATION:
MUNICIPAL CORPORATIONS:

Every municipality to be consolidated under Section 72.150 RSMo 1959, must be adjoining and contiguous to every other municipality involved in the consolidation.

November 6, 1961



Honorable Raymond R. Roberts
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We are in receipt of your request for an opinion of this office, which request is as follows:

"A question has arisen here relative to the consolidation of several incorporated communities in the 'Lead Belt' Area under House Bill No. 289, Sections 72.157 to 72.200 inclusive, Missouri Revised Statutes, 1959. In this area there are some four towns and several villages with populations of less than five thousand. They are so arranged geographically, that Flat River forms a hub, adjoined on the east by Esther, and on the south by Leadington, on the north by Desloge, and on the west by Elvins. Elvins, Esther, Desloge and Leadington border Flat River but do not touch each other. One or two more or less inactive villages are also in the area.

"Our question concerns the construction of the language 'adjoining and contiguous to each other', as that language is embodied in Section 72.150, specifically whether the three or more incorporated municipalities which form a continuous area not separated by intervening land, the two of which do not touch each other, may properly consolidate in one Section under Chapter 72, Missouri Revised Statutes, 1959."

As you note in your letter, House Bill No. 289 of the 71st General Assembly, repealing Sections 72.150 through 72.200, RSMo 1949, provides for the consolidation of cities. However, the language crucial to the question you present remains unchanged in the new Section 72.150, RSMo 1959, which is as follows:

"When two or more cities, towns or villages, other than those located in counties containing a city, or a part thereof, of more than 400,000 and less than 700,000 inhabitants, in this state adjoining and contiguous to each other in the same or adjoining county shall be desirous of being consolidated, it shall be lawful for them to consolidate under one government, in the manner and subject to the provisions herein prescribed."
(Emphasis supplied.)

Although the meaning of the terms "adjoining and contiguous" when used loosely will sometimes vary with the context, technically and legally they mean to join; to abut; to be in contact with. *Rose v. Smiley*, Mo., 296 SW 815, 817; *Bolen v. Ryan*, 48 Mo. App. 512, 515. The terms are distinguishable from "adjacent," meaning to be near to, or in close proximity to. *Hauber v. Gentry*, Mo., 215 SW2d 754, 758 (citing Webster's New International Dictionary, 2d Ed.). Therefore, it can be concluded that Section 72.150, RSMo 1959, applies only to municipalities, the boundaries of which are at some point actually in contact; are touching.

The question remains, which municipalities must be adjoining? The statute provides that they must be "adjoining and contiguous to each other." It is evident that the proposed ordinance enclosed with your letter was drafted on the theory that a series of municipalities may consolidate under this section when they form a chain in which every municipality affected is adjoining and contiguous to at least one other municipality in the chain, but every one is not adjoining and contiguous to every other one in the chain. The determination of the question must turn on the interpretation of the phrase "to each other," used in Section 72.150. It is our opinion that the word "each" is a distributive term and, as used here, is all-inclusive and has reference to every affected municipality. Thus, every municipality to be consolidated must be adjoining and contiguous to every other one involved. Since the terms "adjoining and contiguous" denote actual contact, only those cities, towns and villages sharing a common boundary at some point or points may vote to consolidate.

We are supported in this conclusion by the case of State ex rel. Ives v. City of Kansas City, Kan., 31 P. 1100. In that case, the applicable statute provided for mandatory consolidation of certain cities "lying adjacent to each other and not more than three fourths of one mile apart," and meeting certain other qualifications. The cities of Kansas City, Wyandotte, and Armourdale were consolidated pursuant to the statute and an action was brought some time later to dissolve the newly created city on the ground that the requirements of the consolidation statute were not met. It appears that there was a common boundary between Kansas City and Wyandotte and between Kansas City and Armourdale but that a railroad right of way 750 feet wide separated Wyandotte and Armourdale. The court held Wyandotte and Armourdale to be "adjacent" within the statutory limit of three fourths of a mile. The significance of the case for present purposes lies in the fact that it was apparently conceded by the parties and assumed by the court that the language "adjacent to each other" means that every city within the group to be consolidated had to be adjacent to every other such city. Were this not so, it would not have been necessary to determine whether the intervening railroad strip prevented Wyandotte and Armourdale from being adjacent, since, admittedly, Armourdale was adjacent to Kansas City which was adjacent to Wyandotte. The case is distinguishable from the present situation inasmuch as the statute required only that cities be "adjacent to each other" rather than "adjoining and contiguous to each other" as prescribed by Section 72.150. However, it does serve to illustrate the construction placed, at least by implication, on the words "to each other," common to both statutes.

CONCLUSION

It is therefore the opinion of this office that consolidation may be accomplished under Section 72.150, et seq., RSMo 1959, only when every affected municipality is adjoining and contiguous (meaning connected) to every other affected municipality.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MERIT SYSTEM:
MARSHAL:
CITIES, TOWNS & VILLAGES:
POLICE:
POLICE DEPARTMENTS:

Adoption of merit system police plan by city of third class eliminate office of marshal; chief of police under merit plan, performs duties previously performed by marshal.

December 26, 1961



Honorable Raymond R. Roberts
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Roberts:

We are in receipt of your request for an opinion of this office which reads as follows:

"This office has been requested to request an opinion concerning the institution of the merit system police plan under Chapter 85 of the Missouri revised statutes, for the city of Bonne Terre, which is a third class city. This is specifically provided for in Section 85.541, enacted in 1955 in the legislature.

At the present time the city of Bonne Terre has an elected City Marshall. It is this office's feeling that the city of Bonne Terre can institute the merit system police plan under Chapter 85, however, there are some specific requests which need to be clarified. These are the following:

1. Does the adoption of the merit system police plan by the city of Bonne Terre, eliminate the office of Marshall?
2. If so, does the Chief of Police perform the Marshall's statutory duties?
3. Assuming that the merit system police plan is put into effect, properly

Honorable Raymond R. Roberts

under the statutes of Missouri, must there still be an election for the office of Marshall pursuant to Section 77.370, or may the office be eliminated from the ballot entirely?

4. Again, assuming that a legally constituted merit system police department is instituted and it is your decision that the office of Marshall is not eliminated, and there is an election pursuant to Section 77.370, what are the powers and duties of the Marshall?"

Chapter 77, RSMo 1959, contains the statutory provisions governing cities of the third class. Subsection 1 of Section 77.370, RSMo 1959, reads as follows:

"1. Except as hereinafter provided, the following officers shall be elected by the qualified voters of the city: Mayor, police judge, attorney, assessor, collector, treasurer and, except in cities which adopt the merit system police department, a marshal."

Under this section the adoption of a merit system police plan authorized by Section 85.541, RSMo 1959, eliminates the office of marshal in cities of the third class. The first question posed in your request must therefore be answered in the affirmative. In this connection, however, your attention is directed to Section 85.571, RSMo 1959, which provides as follows:

"Persons elected or appointed to office prior to the effective date of sections 85.541 to 85.571 and persons elected or appointed prior to an adoption of a merit system police department therein provided for shall continue in office for the remainder of the term for which they were elected or appointed."

In answer to your second question we direct attention to the provisions of sections 85.541, subsection 1, 85.551, subsection 1, RSMo 1959. Section 85.541, subsection 1, reads as follows:

"1. Any city of the third class may by ordinance adopt a merit system police department. Such police department shall have a chief of police, and may have a deputy chief of police, and such number of regular policemen of such rank or grade as may be prescribed by ordinance."

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Section 85.551, subsection 1, provides as follows:

"1. In cities of the third class which shall not have adopted the merit system police department provided for in sections 85.541 to 85.571, the marshal shall be the chief of police, and there also may be one assistant marshal, who shall serve for a term of one year and who shall be deputy chief of police; such number of regular policemen as may be deemed necessary by the council for the good government of the city; who shall serve for terms of one year; and such number of special policemen as may be prescribed by ordinance, to serve for such time as may be prescribed by ordinance."

These sections provide for a chief of police when a merit police plan has been adopted in cities of the third class and for a marshal in cities of that class to be the chief of police when a merit system has not been adopted.

We, therefore, construe the legislative intent to be that these officers are to perform similar functions. Under these provisions if a merit system is adopted the chief of police will assume all supervisory powers exercised previously by the marshal. The answer to the second question is then in the affirmative.

We believe that the answer to your third question is that there should not be an election for the office of marshal in cities of the third class which have adopted a merit system police plan and that, therefore, the office should be eliminated from the ballot.

Section 77.370, RSMo 1959, it will be noted, expressly provides that a city marshal is to be elected "except in cities which adopt the merit system police department".

Inasmuch as we have previously held in this opinion that the office of marshal in third class cities which adopt the merit system police plan is eliminated, your fourth question need not be answered.

CONCLUSION

It is the opinion of this office that the adoption of a merit system police plan under the authority of Section 85.541, RSMo 1959, by a city of the third class eliminates the office of

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marshal, except that the incumbent holds office until the end of the term for which he was elected, therefore there should be no election after the adoption of the plan for that office. It is further our opinion that the chief of police assumes the duties previously performed by the marshal when the city involved was operating without the merit police plan.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EE:ms



July 18, 1961

Honorable June R. Rose, Chairman
Industrial Commission of Missouri
Department of Labor and Industrial Relations
State Office Building
Broadway and High Streets
Jefferson City, Missouri

Dear Mr. Rose:

This letter is in answer to your opinion request of July 5, 1961 regarding the Prevailing Wage Law, Sections 290.210 to 290.310 RSMo 1959. In it you state three questions, as follows:

"First: Whether a school board can lawfully proceed in the manner above-described, that is, to employ their own superintendent or adviser, and also employ the workmen without entering into a specific building contract with a building contractor.

"Second: If they do have such authority, are they required to pay the workmen not less than the prevailing wage fixed by the Commission and unappealed from?

"Third: Whether that portion of Section 290.230, above-quoted, means that only employees of contractors or subcontractors shall be deemed to be employed upon public works."

In answer to your first question we enclose copies of opinions of this office issued to Mr. Hubert Wheeler on February 20, 1952 and the Honorable L. Clark McNeill on July 9, 1948 which answer that question in the affirmative.

In regard to your second question we call your attention to the case cited in your opinion request, State ex rel City

Honorable June R. Rose

of Joplin vs. Industrial Commission of Missouri (1959) 329 S.W. 2d 687, which held that the Prevailing Wage Law does not apply to employees of public bodies.

In answer to your third question we again direct your attention to the above cited case which answers that question in the affirmative.

Yours truly,

THOMAS F. EAGLETON
Attorney General

BE:aa

EMPLOYMENT SECURITY: Leroy F. Schantz, Director, authorized to requisition funds from federal Unemployment Trust Fund.

January 20, 1961



Honorable Leroy F. Schantz
Director, Division of
Employment Security
Department of Labor and
Industrial Relations
Jefferson City, Missouri

Dear Mr. Schantz:

We have received your request for an opinion of this office, which reads as follows:

"According to the requirements of the Director of Employment Security, Department of Labor, and the Fiscal Service of the Treasury Department, a certification by the Attorney General with respect to my appointment as Director of the Division of Employment Security of the Department of Labor and Industrial Relations, is required in accordance with the following:

'Treasury Department Requirements for Withdrawals From the Unemployment Trust Fund. In order that State agency requisitions for moneys from the unemployment trust fund may be honored by the Treasury Department, whenever the status of the person or persons previously certified has changed, the Treasury Department requires that the following must be submitted directly to it:

'A. An original, signed opinion or certification by the attorney general of the State, or a certified copy thereof,

Honorable Leroy F. Schantz

that the individual over whose signature the requisitions are made has duly constituted authority under the State law and under resolution of the State agency, if required by law or regulation, to make such requisitions. If such qualified individual delegates his authority to requisition funds from the unemployment trust fund, the opinion shall contain reference to the authority for such delegation of power.'

"The provision relating to requisitioning funds from the Missouri Account in the Federal Unemployment Trust Fund will be found in Section 288.290.4, RSMo.

"I respectfully request that you supply me the opinion or certification required by Paragraph A above."

Section 288.290, subparagraph 4, R. S. Mo., provides, in part:

"4. Moneys shall be requisitioned from the Missouri account in the federal unemployment trust fund solely for the payment of benefits or for refunds of contributions in accordance with regulations prescribed by the director, except that money credited to this state's account pursuant to section 903 of the Social Security Act, as amended, shall be used exclusively as provided in subsection 5. The director shall from time to time requisition from the federal unemployment trust fund such amounts, not exceeding the amounts standing to the Missouri account therein, as he deems necessary for the payment of benefits and refunds for a reasonable future period. * * *"

Section 288.220, R. S. Mo., provides in part, as follows:

Honorable Leroy F. Schantz

"1. The division of employment security of the department of labor and industrial relations shall be under the control, management and supervision of a director who shall be appointed by the governor, by and with the advice and consent of the senate. Such director shall be a citizen and qualified voter of this state, and he shall serve at the pleasure of the governor. He shall be paid a salary of ten thousand dollars per year from the unemployment compensation administration fund."

By virtue of the above statutory provisions, the person authorized to make requisitions for withdrawals on behalf of the State of Missouri from the Unemployment Trust Fund is the Director of the Division of Employment Security. In our opinion, you are now the person legally holding that office by virtue of your appointment by the Governor of the State of Missouri and the confirmation of such appointment by the Missouri Senate.

The State Senate of the State of Missouri received, on January 16, 1961, a message, in writing, from John M. Dalton, Governor of the State of Missouri, while the State Senate of Missouri was in session in the 71st General Assembly of the State of Missouri, informing the Senate that he had appointed Leroy F. Schantz, Springfield, Greene County, Missouri, Director of the Division of Employment Security of the Department of Labor and Industrial Relations for the State of Missouri for a term ending at the pleasure of the Governor of Missouri and requesting the consent to, and approval of, such appointment by the State Senate (Senate Journal, 71st General Assembly, pages 69-70.)

Such appointment of Leroy F. Schantz was by the State Senate of the State of Missouri, in session on January 16, 1961, approved and confirmed, and the Governor was by the State Senate of the State of Missouri so notified thereof in writing.

Thereafter, in conformity with such confirmation by the State Senate of said appointment, John M. Dalton, Governor of the State of Missouri, did appoint and commission the said Leroy F. Schantz as Director of the Division of Employment Security of the Department of Labor and Industrial Relations of Missouri for a term ending at the pleasure of the Governor. Pursuant

Honorable Leroy F. Schantz

to Section 28.060, R. S. Mo., the abstract of said commission is recorded in Civil Register No. 5, page 194, of the Official Records of the Secretary of State of Missouri.

On January 17, 1961, Leroy F. Schantz took the oath of office as Director of the Division of Employment Security of the Department of Labor and Industrial Relations and entered upon the performance of the duties of that office, and now duly holds the same.

CONCLUSION

It is therefore the opinion of this office that Leroy F. Schantz, Director of the Division of Employment Security of the Department of Labor and Industrial Relations of the State of Missouri, is the person who has duly constituted authority under the laws of the State of Missouri to make requisitions for moneys from the Unemployment Trust Fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Baumann.

Yours very truly,

Thomas F. Eagleton
Attorney General

JCB:aa

MAGISTRATES:

Incumbent magistrates salaries must be increased or decreased as of January 1, 1961, the effective date of 1960 census if application of statutory classification in effect at commencement of their terms so results.

January 26, 1961



Comptroller and Budget Director
State Capitol
State of Missouri
Jefferson City, Missouri

Dear Mr. Schwada:

In your letter of January 20, 1961, you have requested an official opinion on the following question:

Among other duties, this office prepares requisitions for payment of the salaries of magistrates and magistrate clerks. The salaries of magistrates and magistrate clerks are fixed by law, based upon assessed valuation and population. Since official population figures are now available from the 1960 census, some changes in salaries for magistrates would appear to be necessary. In some cases salaries would be increased and in other cases decreased.

In view of the provisions of House Bill 304, 70th General Assembly, and other applicable statutes, should this office decrease or increase, in accordance with statutory classifications, magistrate salaries effective January 1, 1961?

Since requisitions for magistrate salaries must be prepared by January 25, if salaries are to be paid at the time specified by the statute, may we please have your opinion at your earliest convenience?

This office has just completed an opinion dated January 26, 1961 to Mrs. G. B. Stewart, Prosecuting Attorney, Douglas County, on a similar question. We believe that this opinion, a copy of which is submitted herewith, will answer your question.

CONCLUSION

It is our opinion that where the application of the statutory formula so requires, magistrates' salaries must be changed as of January 1, 1961 in accordance with statutory classification contained in the laws in effect at the commencement of their terms, irrespective of whether such change results in an increase or a decrease in the amount of compensation payable.

The foregoing opinion which I hereby approve was prepared by my assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:vm

GENERAL ASSEMBLY: Pay increase of legislators effective
PUBLIC OFFICERS:
LEGISLATION: 90 days after passage. Emergency clause
CONSTITUTIONAL LAW: invalid. Later of two conflicting constitutional provisions will prevail.

January 27, 1961

Honorable John W. Schwada
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri



Dear Sir:

We have your letter of recent date, which reads as follows:

"By constitutional amendment approved by the voters on November 8, 1960, the General Assembly of Missouri is authorized to fix the salary of its members. Pursuant to the amendment the 70th General Assembly met in extraordinary session on December 19, 1960, and by House Bill No. 1, established legislative salaries at \$4,800 per year. Appended thereto is an emergency clause.

"These questions relating to the bill are raised for your consideration:

1. In view of Section 13, Article VII of the Missouri Constitution, may members of the General Assembly whose terms extend from January, 1958, to January, 1962, now receive the salary provided by House Bill No. 1, noted above?

2. Does the matter contained within House Bill No. 1, noted above, constitute an emergency within the meaning of Section 29, Article III, of the Missouri Constitution and thereby authorize payment of the new salary rate prior to the expiration of 90 days?"

Honorable John W. Schwada

The two questions contained in your request may be restated as follows: What is the effective date of House Bill No. 1 both as to incumbent senators and as to other members of the General Assembly?

It is the opinion of this office, as elaborated herein, that the effective date of the salary increase provided for by House Bill No. 1, Extraordinary Session, 70th General Assembly, as to all senators and representatives will be ninety days after the adjournment of the special session.

Constitutional Amendment No. 2, approved in the general election of November 8, 1960 (and now Sec. 16 of Art. III), empowers the General Assembly to fix the salaries of its members. To the extent here applicable, the amendment reads as follows:

"Senators and representatives, until otherwise provided by law, shall receive from the state treasury as salary the sum of one hundred and twenty-five dollars per month. No law fixing the compensation of members of the general assembly shall become effective until the first day of the regular session of the general assembly next following the session at which the law was enacted."

Pursuant to the authority granted by the amendment, the 70th General Assembly, meeting in extraordinary session, enacted House Bill No. 1, increasing legislators' salaries to \$4,800 per year.

Your first question is whether the so-called "holdover" senators are entitled to receive the amount of compensation fixed by House Bill No. 1 during their present terms. Necessarily as part of the question is the effect, if any, of Section 13 of Article VII of the Constitution of 1945, which contains general prohibitory language against increasing the compensation of state officers during their terms of office. This section provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Honorable John W. Schwada

The newly adopted amendment, in mandatory language, provides that senators and representatives "shall receive" the amount of their present salary "until otherwise provided by law." Upon the effective date of a law so providing, the salary they "shall receive" is necessarily the amount fixed by law. Unless such new rate is effective as to all members of the General Assembly, then such of those who are excepted from the new rate would be receiving the former amount after the law otherwise provided, contrary to the constitutional mandate that the old rate shall apply only "until" otherwise provided by law.

The clear intent of the voters, as expressed in the amendment, is that when a law is passed setting a new salary rate, then this amount so fixed is to have the same effect as though it had initially been incorporated in the amendment itself. That is to say, when House Bill No. 1 changing the compensation became effective, the amendment would have the same meaning as though it had expressly provided that "senators and representatives . . . shall receive . . . the sum of \$4,800 per year."

The amendment does not limit the phrase "senators and representatives." All are necessarily included. In the absence of any limiting phrase, the amendment must be deemed to express the unequivocal intent of the voters that all senators and representatives "shall receive" not merely the sum initially fixed as salary, but any other sum subsequently established. It would be unreasonable to attribute an intent to the voters to discriminate as to some legislators. On the contrary, the intent is clearly expressed to establish a rate of compensation uniformly applicable to all legislators which all "shall receive" as and when the rate is changed by law.

The new amendment deals exclusively with the compensation of legislators. Section 13 of Article VII contains a general prohibitory provision against increasing the compensation of state and other officers. Any conflict between the two constitutional provisions must be resolved in accordance with established principles of constitutional construction. One such rule is that whenever possible, seemingly conflicting provisions should be harmonized so as to give effect to both. State ex rel. Crutcher v. Koeln, 332 Mo. 1229, 61 SW2d 750.

However, the express provision of the amendment that senators and representatives "shall receive" a certain sum "until" the effective date of a new law cannot be harmonized with the general prohibition of Section 13 of Article VII. If the general prohibition were to apply, it would mean that

Honorable John W. Schwada

some legislators would receive the lesser sum after the effective date of House Bill No. 1, contrary to the command of the recent amendment that the old rate be applicable only "until" a new law is effective. There is no way the two provisions may be harmonized. Only one of the two may be given effect. In such a situation, the rule is that the amendment, being more recent in point of time, must prevail.

The Supreme Court was faced with a similar problem in the case of State ex inf. McKittrick v. Bode, 342 Mo. 162, 113 SW2d 805. In that case a constitutional amendment passed the previous year established a Conservation Commission and provided that the Commission "shall determine the qualifications of the director." Section 10 of Article VIII of the Constitution of 1875 (now Sec. 8 of Art. VII of the 1945 Constitution) provided that no person shall be appointed to any office in this state who shall not have resided in this state for one year next preceding his appointment. The Commission appointed Bode as director although he had not resided in the state for the one year next preceding his appointment. The Supreme Court held that the quoted provision of the amendment which authorized the Commission to fix the qualifications of the director was irreconcilable with the residence requirement of the original Constitution and that said provisions cannot be harmonized. So holding, the Court applied the principle that the more recent amendment must prevail over the previously existing section as an exception thereto. The Court used the following language (113 SW2d 1.c. 808-9):

"We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' In other words, we are without authority, absent an ambiguity, to resort to interpolation. In this situation, 'the rule as to harmonizing inconsistent provisions' is without application. The rule is stated as follows: 'Many troublesome questions of constitutional construction arise in the interpretation of constitutional amendments with reference to the earlier constitutional provisions to which they have been added. In accordance with the general rule that harmony in constitutional construction should prevail whenever possible, generally

an amended Constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law. A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except in so far as the old order is in manifest repugnance to the new Constitution, but such a provision should be read in the light of the former law and existing system. Amendments, however, are usually adopted for the express purpose of making changes in the existing system. Hence it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time. In such a case the rule is firmly established that an amendment duly adopted is a part of the Constitution and is to be construed accordingly. It cannot be questioned on the ground that it conflicts with pre-existing provisions. If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions. If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superseded.' 11 Am. Jur. § 54, pp. 663, 664.

* * * *

"The paragraph under consideration and said section 10 are in direct conflict, and said paragraph is a limitation on section 10 to the extent of authorizing the commission to determine the necessary qualifications of a director."

The applicable principle has recently been stated in State ex rel. Board of Fund Commissioners v. Holman, Mo. Sup., 296 SW2d 482, 1.c. 491, as follows:

Honorable John W. Schwada

"And of course 'a clause in a constitutional amendment will prevail over a provision of the constitution or earlier amendment inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it.' 16 C.J.S., Constitutional Law, § 26, p. 99; State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017, 1020."

An opinion of this office to E. G. Armstrong, Comptroller, under date of October 4, 1946, ruled on a similar question concerning the effective date of a salary increase insofar as it pertained to incumbent circuit judges. The specific constitutional provision there involved (Sec. 24, Art. V, Constitution of 1945) read, in part, as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law. . . ."

In ruling that this provision could not be harmonized with Section 13 of Article VII, it was the opinion of this office that the specific provision prevailed over the general prohibitory provision, and that the salary increase should be paid to the incumbent judges as of the effective date of the law providing therefor.

The foregoing necessitates the conclusion that senators whose terms extend from January, 1958 to June, 1962, are entitled to and shall receive the compensation provided by House Bill No. 1 as of the effective date of said law.

Implicit in our reasoning on this question is the assumption that members of the General Assembly are "state officers" within the meaning of Section 13 of Article VII. Inasmuch as there are no authoritative decisions on the point, and since the conclusion reached herein does not require a determination of that question, this is merely a working assumption and should not be construed as an official opinion on the question of whether or not members of the General Assembly are "state officers."

*But not
apply to
judges
etc.*

Honorable John W. Schwada

Your second question presents for our consideration the effect of the emergency clause contained in Section 3 of House Bill No. 1. Two sections of the Constitution must be considered in determining the validity of such emergency clause. These are Sections 29 and 52 of Article III, as follows:

"Section 29. No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that the laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

"Section 52. A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded. * * * * Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise."

While Section 29, supra, provides that an act may go into effect sooner than ninety days after the adjournment of the Legislature "in case of an emergency," Section 52 provides that all laws except those "necessary for the immediate preservation of the public peace, health or safety" (and some others not material to our discussion here) shall be subject to referendum at any time within ninety days after the adjournment of the Legislature. As we shall hereinafter point out, our Supreme

Court has always construed these two constitutional provisions together and has held that the emergency referred to in Section 29 must be such as makes it "necessary for the immediate preservation of the public peace, health or safety" that a statute go into effect sooner than ninety days after the adjournment of the Legislature. Our Supreme Court has consistently held that a legislative declaration of emergency is subject to judicial scrutiny. In State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 SW 327, 1.c. 338, the Court said:

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum by a mere declaration of 'immediate preservation of the peace, health or safety' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration."

The ruling in the Sullivan case has been followed by our Supreme Court. In the later case of State ex rel. Pollock v. Becker, 289 Mo. 660, 233 SW 641, the decision in the Sullivan case was attacked for several reasons, but the Court expressly approved its holding on the question of the validity of an emergency clause in a legislative act and of the power of the Court to question such validity. The principal opinion in the Becker case said (233 SW 1.c. 644):

"There is but a single legal proposition presented by this record to this court for determination, and that is, Has the Legislature of the state the constitutional authority under section 57, art. 4, of the Constitution, to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, 'This enactment is hereby declared necessary for the immediate preservation of

Honorable John W. Schwada

the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri'? * * * This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited; and, after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by Judge Graves in the case of State ex rel. v. Sullivan, 224 SW 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge Graves, and adopt them as my views of the law of this case."

The Sullivan case was also cited with approval on the same question in State ex inf. Barrett v. Maitland, 296 Mo. 338, 246 SW 267, and Fahey v. Hackmann, 291 Mo. 351, 237 SW 752. Also, in the case of State ex rel. Harvey v. Linville, 318 Mo. 698, 300 SW 1066, the Court, at l.c. 1068, said:

"It was held in the case of State v. Sullivan, 283 Mo. 546, 224 SW 327, that these two sections of the Constitution must be construed together; that a declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect."

From the above we think it is clear that even though a legislative act declares that an emergency exists and that the act is "necessary for the immediate preservation of the public peace, health or safety," the courts are not bound by such declaration, but may and should look at the whole act to determine whether in fact such an emergency is set forth in the act as will authorize the Legislature to cause the act to become effective sooner than ninety days after the adjournment of the Legislature. With this principle in mind, we turn to the act under consideration to see if it declares an emergency within the meaning of the Constitution which would authorize the effective date of January 4, 1961, the date set out in House Bill No. 1.

Honorable John W. Schwada

The emergency clause of House Bill No. 1 reads:

"Because the people of Missouri recognized the total inadequacy of the compensation provided for the members of the general assembly, the constitutional amendment authorizing this act anticipated that the provisions contained herein would become effective on the first day of the regular session of the general assembly next following the session at which this act is enacted, and because the ordinary effective date of this act would be several weeks subsequent to that date, an emergency is declared to exist within the meaning of the Constitution and this act shall be in full force and effect from and after its passage and approval."

The clause states that an emergency exists because the people of Missouri recognize the total inadequacy of the compensation paid legislators and, further, that the constitutional amendment authorizing a pay raise anticipated that it would take effect on the first day of the regular session next following the session at which the increase was voted. Nowhere in the emergency clause is it stated that the act is necessary for the immediate preservation of the public peace, health or safety. Nowhere in the clause or the body of the act itself are facts stated which would justify a judicial determination that the public, peace, health or safety would be seriously imperiled were not the act to be given immediate effect. Whether or not the pay of members of the General Assembly is increased, that body will continue to function. To postpone the operation of House Bill No. 1 may cause inconvenience to some; perhaps even hardship to a few, but still an emergency situation within the meaning of Section 52 of Article III is not presented by the act.

In *Fahey v. Hackmann*, 291 Mo. 351, 237 SW 752, 1.c. 761, the Supreme Court was concerned with a veteran's benefit bill carrying an emergency clause which read:

"The fact that many of the beneficiaries of this act are not employed and in dire need of the partial compensation sought to be provided for them in this act creates an emergency. . . ."

Honorable John W. Schwada

Ruling that an emergency clause is proper only with respect to laws necessary for the immediate preservation of the public peace, health or safety, the Court held that the emergency clause was ineffective, saying:

"It is by virtue of this clause that proposed action under the law at this time is threatened. We regret to postpone the disposition of this fund, so richly deserved by the beneficiaries thereof, for even the short space of six or seven weeks, but we feel that the heroes entitled to the fund would not ask us to run counter to former judicial determinations in order to save this short space of time."

In *State ex rel. v. Sullivan*, supra, the Court stated the principle which still guides judicial analysis of a purported emergency clause as follows (224 SW 1.c. 339):

"So that in the case at bar, had the law makers in section 81 of the measure actually declared such measure to be necessary for the 'immediate preservation of the peace, health or safety,' we would hold such section void upon a comparison of the measure as a whole with the constitutional provisions of section 57 of article 4 of the Constitution. The words 'necessary for the immediate preservation,' as found in our Constitution, must be given effect, and are of vital importance in measuring the legislative act by the Constitution. Many acts may be necessary to public peace, health, and safety, yet not be 'necessary for the immediate preservation of the public health, peace or safety.'"

In the light of these and many other court decisions invalidating emergency clauses which state on their face an even greater threat to the public peace, health or safety than is contained in the bill under consideration, our conclusion must be that the emergency clause in House Bill No. 1 is ineffectual. *Inter-City Fire Protection Dist. of Jackson County v. Gambrell*, 360 Mo. 924, 231 SW2d 193; *State ex inf. Barrett v. Maitland*,

Honorable John W. Schwada

296 Mo. 338, 246 SW 267; State ex rel. Kolen v. Southwestern Bell Telephone Co., 316 Mo. 1008, 292 SW 1037; Hollowell v. Schuyler County, 322 Mo. 1230, 18 SW2d 498.

The constitutional amendment approved on November 8, 1960, contains the following sentence:

"No law fixing the compensation of members of the general assembly shall become effective until the first day of the regular session of the general assembly next following the session at which the law was enacted."

Absent the foregoing language, the act would unquestionably become effective ninety days after the adjournment of the special session, unless the emergency clause were valid. Section 29, Article III of the Constitution. What then is the effect of such language? It is the opinion of this office that the amendment may not reasonably be construed as making mandatory in all instances the first day of the next regular session after enactment of the statute as the effective date thereof. To so construe the amendment would render it in irreconcilable conflict not only with Section 29 but with Sections 49 and 52 of the Constitution. Section 29, as above noted, provides that "no law . . . shall take effect until ninety days after the adjournment of the session at which it was enacted." Section 49, so far as here relevant, reserves to the people the power to approve or reject by referendum any act of the general assembly, and Section 52 provides a period of ninety days after adjournment of the session for the filing of referendum petitions. There is no language whatever in the amendment of November 8, 1960, which would indicate an intention to exclude from the referendum provisions of the 1945 Constitution an act fixing salary for members of the General Assembly.

Under our Supreme Court decisions no bill subject to referendum may become effective until the expiration of the ninety-day period within which referendum petitions may be filed. To this effect are the cases of State ex rel. Moore v. Toberman, 363 Mo. 245, 250 SW2d 701, and State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 SW 327. In the Toberman case it was expressly ruled (250 SW2d 1.c. 706):

"Moreover, § 52(b) clarifies beyond question the intent and scope of the referendum provided in § 52(a). It provides: ' * * *

Honorable John W. Schwada

Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise.' This is a clear declaration that the referendum provided for in 52(a) is not intended to apply to laws that have become effective."

And in the Sullivan case (224 SW 1.c. 335), the Court stated the rule as follows:

"That an act may take effect under a general emergency clause, and yet be subject to the referendum, is clearly contrary to the intent of the amendment, and would produce disastrous results. The clause in the amendment which reads, 'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise,' clearly means that a law upon which the referendum is invoked cannot take effect prior to its approval by the vote; and consequently no act that is subject to the referendum can be made to go into operation for 90 days after the adjournment of the session or its approval by vote."

The conclusion is inescapable, therefore, that if, as we believe, acts passed pursuant to the amendment of November 8, 1960, are subject to the referendum, House Bill No. 1 cannot take effect until ninety days after the adjournment of the special session.

It does not follow, however, that the provision that no bill passed pursuant to the amendment shall not take effect until the first day of the next regular session is meaningless. The sentence is couched in negative terms, and may readily be reconciled with Section 29. Where possible in cases of seeming conflict, both provisions of the Constitution should be harmonized so that both may be made operative. State ex rel. v. Koeln, supra (61 SW2d 1.c. 755). Applying this rule of construction, it is our opinion that any act passed pursuant to the amendment would take effect ninety days after the adjournment of the session at which it was passed (or the beginning of a recess) unless such date is prior to the first day of the next regular session of the Legislature. In the latter event, the effective date of the act would be postponed to the first day of the next regular

Honorable John W. Schwada

session. In the present situation, since the next regular session after passage of the act was within the ninety-day period, then the act necessarily becomes effective at the end of such ninety-day period.

It should be noted that Section 29, providing that no law shall take effect for ninety days after adjournment, has never been construed as mandatory, and thereby making all laws effective at the expiration of such ninety-day period. Our Supreme Court has ruled that the effective date of a law may be postponed beyond the ninety-day period. Construing the similar language of the 1875 Constitution, the Court held in *State ex rel. Brunjes v. Bockelman*, 240 SW 209, that the Constitution "places no inhibition upon the Legislature as to fixing a future date for a law to become effective." That is to say, the provision that no law shall become effective until ninety days after adjournment means simply that except as to emergency and other specified legislation, a law may become effective on any date fixed by the Legislature unless such date is less than ninety days after adjournment, in which event the ninety-day period governs. Applying the same principle and harmonizing the two constitutional provisions, the clear intent of the amendment is simply to prohibit any change in legislators' salary from becoming effective before the first day of the next regular session even if such day is more than ninety days after adjournment.

The foregoing conclusion does not mean that the special session served no useful purpose. Had the special session not been called, no bill fixing legislators' salaries could have been enacted until the present session. No bill enacted at this session could go into effect until the first day of the next regular session, which is almost two years hence. Therefore, by enacting House Bill No. 1 at the special session, the salary increase will take effect in the near future during the present session of the Legislature. It is only because the period between adjournment of the special session and the first day of the present session is less than ninety days that the salary increase may not become effective on the first day of this session.

For the reasons above set forth in answering your first question, this salary increase will take effect as to all senators and representatives under the express provision of the constitutional amendment even though the effective date of the increase is during the term for which all such legislators were elected.

CONCLUSION

It is the opinion of this office (1) that the salary provision of House Bill No. 1 is equally applicable to all senators and representatives, including holdover senators, (2) that the emergency clause of House Bill No. 1 is ineffective, and (3) that House Bill No. 1 will take effect as to all senators and representatives ninety days after the adjournment of the special session at which it was passed. Until that date, the rate of \$125 per month continues in effect.

The foregoing opinion which I hereby approve, was prepared by my assistants James J. Murphy and Joseph Nessenfeld.

Yours very truly,

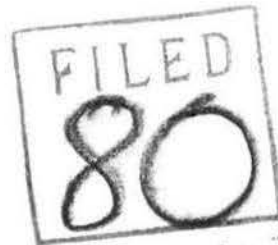


THOMAS F. EAGLETON
Attorney General

COMPTROLLER:
CONSTITUTIONAL LAW:
ATTORNEY GENERAL
CIRCUIT COURTS:

Obligations may be incurred and payments made out of the Milk Control Fund, pursuant to appropriation made in Section 30 of H.C.S.H.B. 574, pending the decision of the Supreme Court on the constitutionality of the Milk Control law, when the Attorney General holds said law to be constitutional and prosecutes an appeal from a circuit court judgment ruling the law invalid. Section 30 of H.C.S.H.B. is valid.

March 22, 1961



Honorable J. W. Schwada
Comptroller and Budget Director
Jefferson City, Missouri

Dear Mr. Schwada:

You recently requested an opinion as follows:

"House Bill 255, 70th General Assembly, provides for the regulation of certain dairy products producers and for collection of fees by the Commissioner of Agriculture in the administration of the law. Since the effective date of the Act, fees have been collected and deposited to a milk control fund, also established by House Bill 255. An appropriation was made against the milk control fund and expenses have been made from it.

"I understand that the milk control law has been held invalid by a circuit court. These questions arise with respect to the operation of this office:

1. May obligations against the milk control fund incurred prior to the date of the above mentioned decision be paid by this office?
2. May obligations be incurred and payments be made from this fund after the date of the decision mentioned above?"

As your request indicates, on January 25, 1961, the Circuit Court of Cole County in the case of The Borden Company v. John Sam Williamson, et al., held that House Bill No. 255, 70th General

Honorable J. W. Schwada

Assembly (Sections 416.410 et seq. V.A.M.S.) is unconstitutional, and enjoined the Commissioner of Agriculture and the Attorney General from enforcing said act. The decision is being appealed to the Supreme Court of Missouri.

This office has advised the Department of Agriculture to continue to enforce the act, at least as against all persons affected thereby other than the Borden Company, pending an authoritative decision of the Supreme Court. Such advice would necessarily imply that the Attorney General is of the opinion that the statute is constitutional and that the Circuit Court's judgment was erroneous. Obviously, the act cannot be effectively enforced absent funds for payment of the expenses of administering such law.

Your opinion request pertains primarily to the validity of the appropriation made by the General Assembly out of the Milk Control Fund for the cost of administering House Bill 255.

House Committee Substitute for House Bill 574, 70th General Assembly, appropriates money for various departments and agencies of the State government and other purposes. Section 30 of that act appropriates to the Department of Agriculture from the Milk Control Fund the sum of \$50,000.00 for the cost of administering House Bill 255. No court has held Section 30, H.C.S.H.B. 574 invalid, nor has this office so ruled.

Certain fundamental principles of constitutional law are here relevant. A statute is presumed to be constitutional until the contrary is made clearly to appear. State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S.W.1, 1.c.7. "An act of the Legislature carries the presumption of constitutionality. The court will not declare an act unconstitutional unless it plainly contravenes the Constitution." Bowman v. Kansas City, Mo. 233 S.W.2d 26,33. "Every presumption must be indulged in favor of the constitutionality of a legislative statute and it will not be declared unconstitutional unless its invalidity is made to appear beyond a reasonable doubt." Ward v. Public Service Commission, 341 Mo. 227, 108 S.W. 2d 136 1.c. 139. "All doubt, if any there be, should be resolved in favor of the constitutionality of a statute." Missouri Electric Power Company v. City of Mountain Grove 252 Mo. 262, 176 S.W.2d 612 1.c.616. So strong is this presumption in favor of the validity of a statute that the Supreme Court in ruling a case will not be bound by the admission of a party respecting the constitutionality of a statute. State ex. rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S.W.2d 640, 642.

It is of course true that an unconstitutional statute is no law and confers no rights. "This is true from the date of its enactment,

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and not merely from the date of the decision so branding it." State ex rel. Miller v. O'Malley 342 Mo. 641, 117 S.W.2d 319, 1.c. 324. Stated otherwise, an unconstitutional statute is "to be regarded void ab initio, and as though it had never been in existence." Lieber v. Heil, Mo. App. 32 S.W.2d 792. On the other hand, the presumption of constitutionality may be relied on by those officials charged with the enforcement of the statute until it is authoritatively ruled invalid by the Attorney General or the Supreme Court. As was held in Kleban v. Morris, 363 Mo. 7, 247 SW2d 832 1.c. 839:

"Their official duty was to administer the law and not to pass on its legality, its enactment by the Legislature carrying a presumption of its validity."

It is for that very reason that the Department of Agriculture is required to administer the Milk Control Law and to act upon the assumption that it is valid.

The Circuit Court decision is in no sense conclusive or binding except only as between the parties to the litigation and those in privity with them, and then only until the Supreme Court rules on the validity of the statute. State ex inf. Kell v. Buchanan, 357 Mo. 750, 210 S.W.2d 359, 361; Agnew v. Union Construction, Mo. 291 S.W.2d 106 109. The Circuit Court suit was not a class action and affects only the parties to the suit. No other producer has any rights growing out of that decision.

In 16 C.J.S. Constitutional Law § 93, pp 305-6, it is said, citing Allen v. State Board of Veterinarians, 72 R.I. 372, 52A.2d 131, that "unless the constitutionality is determined by the appellate court, the determination of constitutionality by the inferior court will stand only for the case in which it was made." Even if the Circuit Court ruling had been adverse to the Borden Company, such judgment would not preclude other producers from seeking a judgment on their behalf either from the same or another circuit court, respecting the validity of the act.

It is the opinion of this office that the Department of Agriculture, which is charged by law with the enforcement of the statute, may not abandon such enforcement simply because a Circuit Court has held such statute invalid under a judgment which is binding only between the parties thereto, absent acquiescence in such judgment by the Attorney General.

The rule in this state is well settled that ordinarily a public officer may not question the constitutionality of a statute imposing ministerial duties upon him. Our Supreme Court, in State ex rel. Missouri & N.A.R. Co. v. Johnston, 234 Mo. 338, 137 S.W.595, 598, ruled as follows:

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"A ministerial officer has no right to pronounce an act of the General Assembly unconstitutional and so disobey it. The power to declare a law enacted by the lawmaking department of the state unconstitutional is entrusted only to the judicial department of the state government; it is not only judicial in its character, but it is of the highest judicial character.

"Obedience to the plain mandate of a statute by a ministerial officer is in no sense a judicial determination or adjudication on his part that the statute is constitutional; he would have no right to disobey it on the ground that, in his opinion, it is unconstitutional. To what confusion would it lead if every ministerial officer in the state was endowed with authority or should assume authority, to pronounce, in advance of any judicial decision, that an act of the General Assembly was unconstitutional, and for that reason he would disobey it."

However, in situations where the officer may be subject to civil or criminal liability he has the right, in appropriate situations, to raise such question of constitutionality. There are a number of decisions in this State holding that where the attorney general has advised the comptroller or other comparable officer that a statute is unconstitutional the officer has not only the legal right but the legal duty of raising the question of constitutionality of the law and to refuse to certify a claim for payment pending a decision of the Supreme Court. The most recent of such decisions is State ex rel State Board of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75. Other cases are State ex rel Wiles v. Williams, 232 Mo. 56, 133 S.W.1 and State ex rel S.S. Kresge Company v. Howard, 357 Mo. 302, 208 S.W.2d 247, 249.

Among the many other cases supporting the general proposition that a public officer may not ordinarily question the constitutionality of a statute are State ex rel Equality Sav. & Bldg. Ass'n. v. Brown, 334 Mo. 781, 68 S.W.2d 55; State ex rel Chicago R.I. & P. Ry. Co. v. Becker, 328 Mo. 541, 41 S.W.2d 188; and State ex rel Volker v. Kirby, 345 Mo. 801, 136 S.W. 2d 319.

The rule derived from the foregoing cases is that where the Attorney General has rendered an opinion that a statute is unconstitutional the officer makes or certifies payments at his peril. Section 33.200 V.A.M.S. provides that if the Comptroller shall knowingly certify a claim for payment unauthorized by law, he is

guilty of a felony. For that reason the Supreme Court in the Pigg case held, 244 S.W.2d 1.c. 78:

"Upon the attorney general's advice that the payment of relator's salary and expenses was unauthorized, the respondent was justified in refusing (pending an opinion of this court) to approve and certify the items listed in the request."

On the other hand, the administration of laws would be thrown into a state of chaos if the comptroller or other public officer were to question the validity of every statute under which he is required to act. Although there are situations in which an opinion of the Attorney General will not suffice to protect an officer (State v. Thompson, 337 Mo. 328, 85 S.W.2d 594), yet where, as in the instant matter, the question involved is the constitutionality of an appropriation to enforce the Milk Control law, the Comptroller may in good faith rely on the opinion of his official legal adviser. When the attorney general has advised the officer that the statute is constitutional and the Supreme Court has not ruled otherwise, it should follow that the Comptroller has not "knowingly" certified a claim for payment "unauthorized by law". Although it is true that an unconstitutional statute is void ab initio, so that any payments required by such statute would technically be "unauthorized by law", nevertheless the officer would be protected in acting upon the assumption of the validity of the law, under the doctrine of Kleban v. Morris, supra. The words "unauthorized by law" are not used in the technical sense. If they were, the normal functions of government would break down. Miller v. Dunn, 72 Cal. 462, 14 P. 27.

If the Supreme Court were to reverse the decision of the Circuit Court, it would follow that the statute was constitutional from the date of its enactment and not merely from the date of the reversal. See Pierce v. Pierce, 46 Ind. 86; Miller v. Duncan 72 Cal. 462, 14 P. 27; and Jawish v. Morlet (D.C.) 86 A.2d 96. In the latter case it was held, 86A. 2d 1.c.97, that "if the decision is reversed the statute is valid from its first effective date" That is why (the Attorney General being of the opinion the Milk Control law is constitutional) it is necessary to enforce the statute pending an authoritative decision of the Supreme Court. Inasmuch as enforcement carries with it the necessity of incurring expenses to make such enforcement effective, the department may properly incur such expenses within the limitations of the appropriation. For the Comptroller to withhold the necessary funds would effectively prevent enforcement.

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Moreover, the instant situation is not comparable to that involved in the Pigg case where the very statute which was ruled unconstitutional by the attorney general created the officers who were to administer the act and fixed their compensation. The "issue presented" in that case was whether the Mediation Board had "legal official existence and lawful capacity to incur expenses and permit salaries to accrue so that the items listed in the requisition are valid obligations payable out of the state treasury and may be approved and certified by respondent without civil or criminal liability to himself." In the instant situation, the act creates no new office. On the contrary, the act is enforced by the Commissioner of Agriculture. Neither his existence nor that of the Department of Agriculture would be affected by the invalidity of the act if it should be held unconstitutional, and the subordinate employees assigned the task of enforcing the act are regular employees of the Department of Agriculture. Hence, this case does not involve the more difficult problem (ruled by the Pigg opinion) of whether a de facto officer is entitled to compensation.

There is one case in which a somewhat similar situation was ruled, State ex rel Coulter v. Yelle, 183 Wash. 691, 49 P. 2d 465. In that case the Supreme Court of Washington held that an employee of the Department of Agriculture who performed services in connection with the administration of a statute which had been held unconstitutional by the Supreme Court was entitled to compensation for such services out of the appropriations made therefor. The facts of that case are somewhat different than those here presented, and in addition, it did not involve the effect of an inferior court decision. In that case, the Court thought it important that the appropriation was made in the very act which had been held unconstitutional, from the general fund of the state, limited to such amount as should be received from licenses collected under the law. In the instant case, although the Milk Control Fund was established by the act, the appropriation was made by a separate statute out of that fund and not out of general revenue. Although these facts serve to distinguish the two cases, we believe the basic principle is applicable. As the court there pointed out, if it be held that the appropriation section was void ab initio and that there was no appropriation by which any money could "now" be paid out, it would also follow that "there never was a lawful appropriation," so that no warrant should ever have been issued against the fund. The Court, however held that irrespective of the invalidity of the statute, the appropriation was in every sense a valid appropriation, and that since the fund had not been exhausted the relator was entitled to compensation for her services.

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The Cole County Circuit Court did not specifically rule upon the validity of the milk control fund as such, although it held the statute void in its entirety. Every decision must be read in the light of the facts and issues for decision. Even broad language in Supreme Court opinions must "be restricted to the issues and facts of the case. The conclusion only, not the process by which it is reached, is the decision of the Court." Schupeck v. Fidler, 362 Mo. 35, 239 S.W.2d 502, 503. All that was necessary for the Circuit Court to decide was that the Commissioner of Agriculture could not legally require the Borden Company to obtain a license or pay a license fee. Moreover, the Circuit Court decision in nowise necessitated a ruling (nor did it expressly pass on) the validity of the separate appropriation law.

It may be true that if the Supreme Court holds the act unconstitutional in its entirety, the effect may be to eliminate the Milk Control Fund as such, so that the funds therein will become part of the general revenue. However, it is nevertheless equally true that such funds are in fact in the state treasury and simply designated as Milk Control Fund. All of the moneys in that fund were derived from license fees collected under the act and were intended to be used for the administration of the act. It is this money collected for this specific purpose, and not general revenue, which the Legislature has appropriated. Presumptively, the appropriation is valid. Under these circumstances, the attorney general having advised the Commissioner to continue enforcement of the act, it is the opinion of this office that payments may be made out of the Milk Control Fund pending an authoritative decision of the Supreme Court respecting the validity of House Bill 255.

The foregoing answers both of the questions concerning which an opinion was requested. With respect to the first question, a further observation may be made. The opinion which this office rendered to Mr. Pigg under date of April 3, 1951, (which is referred to in the case of State ex rel. State Board of Mediation v. Pigg, supra), expressly ruled that obligations and expenses incurred under the act by the de facto officers prior to the date the Attorney General had ruled the law unconstitutional should be certified and paid. Hence, irrespective of any other consideration, it is our opinion that obligations against the Milk Control Fund incurred prior to January 25, 1961, the date of the Circuit Court judgment should necessarily be paid. As we have further ruled herein, it is our opinion that obligations may continue to be incurred and payments made from such fund, within the limits of the appropriation, until such time as the Supreme Court authoritatively rules upon the constitutionality of the law.

Honorable J. W. Schwada

CONCLUSION

It is the opinion of this office that Section 30 of H.C.S.H.B. 574 is valid. It is the further opinion of this office that inasmuch as the Attorney General has advised the Commissioner of Agriculture to continue enforcement of House Bill 255, 70th General Assembly, thereby ruling the act constitutional, obligations may be incurred and payments made out of the Milk Control Fund pending a final ruling of the Supreme Court of Missouri on the appeal from the Circuit Court decision holding that the act is invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Yours very truly,

JN:ms

THOMAS F. EAGLETON
Attorney General

SOIL CONSERVATION DISTRICTS:

OLD AGE AND SURVIVORS INSURANCE:

(1) Soil District on "instrumentality" within the meaning of the Old Age and Survivors Insurance Act; (2) services of soil district employees constitute "employment" within the meaning of Old Age and Survivors Insurance Act; (3) upon adoption and approval of a plan as required by Sec. 105.340 RSMo 1959 (OASI Act) employees of a soil district may be covered by OASI.

July 12, 1961



Dr. John W. Schwada
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Dr. Schwada:

Reference is made to your request for an opinion of this department which reads as follows:

"The question has been raised with this office as to whether or not employees of Soil Conservation Districts should be covered by OASI, as provided in Chapter 105.300 ff. RSMo. 1959. The question seems to hinge on whether or not the above districts are instrumentalities of the State or its political subdivisions. Chapter 278, RSMo. 1959 provides for the establishment of Soil Conservation Districts and outlines their organization and the extent of their authority.

"In view of the above provisions, the question to which an answer is requested seems to be this:

Are employees of Soil Conservation Districts covered by OASI and if so, should they be covered by direct agreement between the Soil Conservation District and this office, or by some other method?

"We will appreciate having your opinion on this matter."

On July 13, 1951, the State of Missouri entered into an agreement with the United States Government, concerning the extension of benefits under the Old Age and Survivors Insurance (42 USCA §401 et seq) to employees of the State of Missouri and

its political subdivisions and instrumentalities.

Sections 278.060 to 278.150 RSMo 1959, are known as the Soil Conservation Districts Law. These sections provide for the establishment of soil conservation districts, each of which is to be governed by a board of soil district supervisors. The boards are authorized to employ people to assist in the performance of their functions.

The question here presented is whether these employees are eligible to be covered by Old Age and Survivors Insurance under the agreement between the State of Missouri and the United States Government.

In order to be eligible, these employees must perform services to which the provisions of Section 105.310, RSMo 1959, apply. The applicable portion of that section reads as follows:

"1. The state agency, with the approval of the governor, shall enter into on behalf of the state an agreement with the Secretary of Health, Education and Welfare, consistent with sections 105.300 to 105.440, for the purpose of extending the benefits of the federal old age and survivors insurance system to employees of the state or of any of its political subdivisions, or of any instrumentality of any one or more of them, with respect to services specified in such agreement, which constitute employment as defined in section 105.300. Such agreement may contain provisions relating to coverage, benefits, contributions, effective date, modifications and termination of the agreement, administration and other appropriate provisions, and except as otherwise required by the Social Security Act as to the services to be covered, such agreement shall provide the benefits will be granted to employees whose services are covered by the agreement, their dependents and survivors, on the same basis as though the services constituted employment within the meaning of Title 2 of the Social Security Act (42 U.S.C.A. §401, et seq).

* * * * *

"4. All services shall be covered by the agreement which:

(1) Constitute employment as defined in section 105.300.

(2) Are performed in the employ of a political subdivision or in the employ of an instrumentality of either the state or a political subdivision; except services performed in the employ of any municipality in connection with its operation

of a public transportation system as defined in section 210 (1) of the Social Security Act (42 U.S.C.A. §410); and there is hereby granted to the governing body of such municipality and the officers in charge of such transportation system such powers and authority as may be necessary to comply with the Social Security Act in extending the benefits of the federal old age and survivors insurance system to the employees of such public transportation system; and

(3) Are covered by a plan which is in conformity with the terms of the agreement approved by the state agency under section 105.350."

* * * * *

The requirements of this section will be discussed in the following order for purposes of logical presentation:

1. Whether Soil Conservation Districts are "instrumentalities" of the State of Missouri.
2. Whether the services performed by the employees of the Soil Conservation Districts constitute "employment" as the word is defined in Section 105.300, RSMo 1959.
3. Whether these employees are covered by a plan which is in conformity with an agreement approved by the division of budget and comptroller as required by Section 105.350, RSMo 1959.

Are the soil conservation districts here involved "instrumentalities" of the State of Missouri?

Section 105.300(7) RSMo reads:

"'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;"

This section does not define what an instrumentality of a state is; in effect it placed three added requirements which must be met by instrumentalities before they come under the Old Age and Survivors Insurance Act.

The operation of a soil conservation district is a governmental function. *Dillon Catfish Drainage District v. Bank of Dillon* (1928)

143 S.C. 178, 141 S.E. 274; Hopkins v. Upper Sciota Drainage and Conservation District (1940) 67 Ohio App. 505; 37 N.E.2d 430. Such districts are, therefore, instrumentalities of the state. In the Hopkins case, supra, an Ohio conservation district, similar in nature and operation to Missouri soil conservation districts, was held to be an instrumentality of the state. The court said l.c. 37 N.E.2d 431:

"The conservancy district, through the statutory provision relating to its organization and the delegation of the powers mentioned, is an instrumentality of the state government, and in the exercise of such powers, performs only a governmental function."

The three added requirements placed on an instrumentality by the Old Age Survivors Insurance Act are that it be (1) a juristic entity which is (2) legally separate and distinct from the state or any political subdivision and (3) whose employees are not by virtue of their relation to such juristic entity employees of the state or any political subdivision.

Do the soil conservation districts meet these requirements? No exact definition of the words "juristic entity" can be found.

Black, Law Dictionary (4th ed. 1951) defines the word "juristic" as:

"Pertaining or belonging to, or characteristic of jurisprudence, or a jurist, or the legal profession."

The same work defines the words "juristic act" as:

"One designed to have a legal effect, and capable thereof."

"An act of a private individual directed to the origin, termination, or alteration of a right. Webster, Dict., citing T.E. Holland."

From these two definitions it is apparent that the word "juristic" is similar to the word "legal" so that it may be said that the words "legal entity" are similar in meaning to the term "juristic entity".

The case of Department of Banking v. Hedges (1939) 136 Neb. 382, 386, 286 NW 277, 281 defined the term "legal entity" as follows:

"The word 'entity' means a real being, existence.
'Legal entity' therefore, means legal existence." * * *

Section 278.120, RSMo 1959, defines the nature, powers and duties of soil conservation districts. In doing so it states in part:

"1. Any soil district organized under the provisions of this law shall be a body corporate and shall possess only such powers as herein provided, but any such powers possessed by said body corporate shall be particularly limited by the following provisos; provided, that the private property of any land representative or owner of property in such soil district shall be exempt from execution for the debts of the body corporate or soil district and no land representative or owner of property within said soil district shall be liable or responsible for any debts of the body corporate or soil district, and provided further, that no property of any character, title to which is not vested in said soil district, or a soil district as the case may be, shall ever be subject to any lien for any claim or judgement of or against said district, or a soil district, as the case may be. Any soil district, so organized shall be officially known and titled 'The Soil District of _____ County', and shall be so designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with.

"2. A soil district through the board of soil district supervisors thereof shall have the following authority and duty in addition to other authority and duty granted in other sections of this law;"

* * * * *

(5) To make and execute contracts and other legal instruments, necessary for the saving of the soil in that district, subject to approval by the state soil districts commission;"

Since soil conservation districts are bodies corporate, can sue and be sued, and can make and execute contracts and other legal instruments, they must be said to have a legal existence. Having such an existence, they are "legal" or "juristic" entities. The first requirement is, therefore satisfied.

In regard to the second requirement, we can think of no instrumentality which is separate and distinct, used in the broadest sense, from its superior. However, this phrase is qualified by the term "legally", i.e. "legally separate and distinct."

A soil conservation district is not in all respects separate and distinct from the state from which it derives its authority. However, we do not believe that this will prevent it from being an entity legally separate and distinct from the state. The following verification of this conclusion is found in the case of Virginia Mason Hospital Ass'n v. Larson, Wash. 114 P. 2d 976, where the Supreme Court of Washington defined the term "separate entity" as follows (1.c. 114 P.2d 986):

"We do not believe that lack of independence from other organizations is the test of whether an institution is a separate entity. Every institution is in a measure dependent upon the functioning of other institutions which provide goods and services necessary for the efficient operation of the former. But each may be nevertheless a completely separate entity. If the control of each of these institutions were in separate hands, it would be clearly evident that the mere interdependence for goods and services would not merge the identity of these organizations."

The third requirement, stating that employees of soil conservation districts must be such independent of any employment by the state or a political subdivision of the state is satisfied by the following language of Section 278.110, RSMo 1959.

"* * *The board of soil supervisors may employ within the limits of available funds such assistants as they may require in the performance of their duties, and shall determine the qualifications, compensation and duties of such employees."

As stated above, we believe that a soil conservation district is an instrumentality of the State of Missouri. We further believe that a soil conservation district as a body corporate is a juristic entity legally separate and distinct from the state and county, the employees of which are not also employees of the state or any political subdivision of the state. The three requirements placed on an instrumentality in order for it to come under the Old Age and Survivors Insurance provisions are, therefore, satisfied.

We now turn to the question whether the services performed by soil district employees constitute "employment" within the meaning of Section 105.300, RSMo 1959. The pertinent part of that section reads as follows:

"* * * (4) 'Employment', any service performed by any employee of the state or any of its political subdivisions or any instrumentality of either of them, which may be covered, under applicable federal law, in the agreement between the state and the Secretary of Health, Education and Welfare, except services, which in the absence of an agreement

entered into under sections 105.300 to 105.440 would constitute 'employment' as defined in section 210 of the Social Security Act (42 U.S.C.A. §410); any services performed by an employee as a member of a coverage group, in positions covered by a retirement system on the date such agreement is made applicable to such coverage group, which retirement system is supported wholly or in part by the state or any of its instrumentalities or political subdivisions, shall not be considered as 'employment' within the meaning of sections 105.300 to 105.440; however, service which under the Social Security Act may be included only upon certification by the governor in accordance with section 218(d)(3) of that act shall be included in the term 'employment' if and when the governor issues, with respect to such service, a certificate to the Secretary of Health, Education and Welfare pursuant to section 105.355;"

This section sets out three criteria which determine whether a certain service constitutes "employment" within the meaning of the statutes. First, the service must be such as may be covered, according to 42 USCA §418 (the "applicable federal law" in this instance) in an agreement between the state and the United States Government. Second, the service must not be one which would constitute "employment" under 42 USCA §410 in the absence of any agreement between the state and the Secretary of Health, Education and Welfare. Third, the employee performing the service must not be under a retirement system supported wholly or in part by either the state, political subdivision of the state, or instrumentalities of the State, at the time an agreement for Old Age and Survivors Insurance purposes becomes applicable to him. This third criteria may, however, be avoided by compliance with 42 USCA § 418 (d)(3), providing for a certificate from the Governor of Missouri to the Secretary of Health, Education and Welfare stating that a referendum held among the state employees in question showed a majority in favor of being included in the agreement between the secretary and the State of Missouri.

We must now determine whether the services performed by employees of soil conservation districts are such as satisfy these three criteria.

Are the services of soil conservation district employees such as may be included in an agreement between the state and the Secretary of Health, Education and Welfare, under the provisions of 42 USCA § 418? 42 USCA §418 (a)(1) states:

"(a)(1) The Secretary of Health, Education and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any

political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

42 USCA §418 (c)(1) states:

"An agreement under this section shall be applicable to any one or more coverage groups designated by the State."

42 USCA §418 (Definitions) (5)(B) states:

"The term 'coverage group' means * * *
(B) employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function;"

42 USCA §418 (2) states:

"(2) The term 'political subdivision' includes an instrumentality of (A) a State, (B) one or more political subdivisions of a State, or (C) a State and one or more of its political subdivisions."

Under 42 USCA §418, a state may designate any group of employees for coverage under an Old Age and Survivors Insurance agreement if the services they are performing are not connected with a proprietary function. As stated above the operation of a soil conservation district is a governmental, not a proprietary function (*Dillon Catfish Drainage Dist. v. Bank of Dillon*, supra, and *Hopkins v. Upper Scioto Drainage and Conservation Dist.*, supra. If therefore, the State of Missouri should desire that the employees of its conservation districts be covered by Old Age and Survivors Insurance, such employees would be eligible to be included in the agreement between the State and the United States Government.

Are the services performed by soil district employees such as would not constitute employment under 42 USCA §410?

42 USCA §410(a)(7) reads as follows:

"(a) The term 'employment' * * * * shall not include * * *

(7) Service * * * performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions;"

Since a soil district is an "instrumentality" of the state, this section applies to its employees, and the second requirement of Section 105.300(4), RSMo 1959, is met.

The third requirement of Section 105.300(4) RSMo 1959 concerns the fact of whether or not the employees involved are under another retirement system financed by funds of the state or of one of its political subdivisions. In your letter of May 15, 1961, you state that soil district employees are not presently under a publicly supported retirement plan. All requirements of Section 105.300(4) RSMo 1959 are therefore satisfied.

One matter remains to be disposed of before soil district employees are covered by Old Age and Survivors Insurance. Each soil district must be covered by a plan which is in conformity with an agreement approved by the division of the budget and comptroller. In your letter of May 15, 1961, you state that no soil district has specifically requested coverage at this time; we therefore assume that no such plan has been formed. When such a plan is adopted, and approved in the manner prescribed by Section 105.350, RSMo 1959, all requirements for the coverage of soil district employees by Old Age and Survivors Insurance will be satisfied.

CONCLUSION

It is the opinion of this department that a soil district is an "instrumentality" within the meaning of Section 105.300(7) RSMo 1959; that the services of employees of a soil district constitute "employment" as defined by Section 105.300(4), RSMo 1959, and that upon the adoption and approval of a plan as required by Section 105.340, RSMo 1959, such employees of a soil district may be covered by old age and survivors insurance.

The foregoing opinion, which I hereby approve, was prepared by my assistant Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

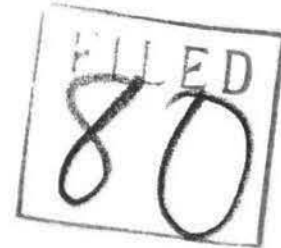
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SPECIAL ROAD DISTRICTS:
OFFICERS:
TERM OF OFFICE:
REMOVAL OF SECRETARY OF
SPECIAL ROAD DISTRICT:

President, vice-president and secretary of special road districts organized under Section 233.170 RSMo 1959 et seq. serve at the pleasure of the board and may be removed from office only upon a majority vote of the board. A secretary, not a member of the board, elected by unanimous vote, holds office until removed by vote of a majority of the board.

July 12, 1961

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri



Dear Mr. Scott:

This office is in receipt of your request for an opinion as follows:

"Section 233.185, Revised Statutes, provides that the commissioners appointed by the County Court and benefit assessment road districts not under township organization may organize and elect one of their number president, vice president and another a secretary and provides that by unanimous vote they may appoint a secretary not a member of the board.

"Section 233.180 fixes the term of each can hold office as three years, one to be elected each year.

"The commissioners of the district in question by consent and by unanimous vote elected a secretary, not a member of the board in September, 1960. No one has been elected secretary since the election held the first Tuesday after the first Monday in January, 1961. The new elected commissioner objects to the secretary holding over.

"Please advise me as to the term of office of president, vice president and secretary or if they have to be elected each year and whether the secretary should be elected each year."

Honorable Rufe Scott

Section 233.185, RSMo 1959, provides in part that the commissioners of a special road district organized under Sections 233.170, RSMo 1959, et seq. "shall meet * * *and shall organize by electing one of their number president, another vice-president and another secretary; provided, that by a unanimous vote of said commissioners any person not a member of said board may be chosen secretary."

The statute is silent with respect to the term of office of officers elected by the board. In such situation, the applicable rule is that the officers are elected for an indefinite period and are removable at the will of the appointive power. In *State ex inf Barrett ex rel Bradshaw v. Hedrick*, 294 Mo. 21, 241 S.W. 402, 1.c. 416, the court stated the foregoing rule as follows:

"If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or the assignment of reasons. * * *"

To the same effect is *Cook v. St. Francois County*, 162 S.W.2d 252.

Section 1.050 RSMo 1959 provides as follows:

"Words importing joint authority to three or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the law giving the authority."

Therefore, the officers elected by the board hold their respective offices at the pleasure of the board and may be removed from the office at any time by a vote of the majority of the board at a meeting of the board duly held.

Your request for an opinion raises the further question as to whether a secretary, not a member of the board and who was elected by unanimous vote of the board as then constituted, may be removed from office by a vote of less than a majority of the board members. Stated otherwise, the question is whether a newly elected commissioner may, by withdrawing his consent to a person not a member of the board continuing to serve as secretary, thereby terminate the tenure of the secretary.

Section 233.185, RSMo 1959, authorizes the board by unanimous vote of the commissioners to choose as secretary a person not a member of the board. Once such a person has been elected as secretary

Honorable Rufe Scott

by unanimous vote, the selection is complete and the secretary so chosen is in exactly the same position as though he had been initially a member of the board. There is no language in the statute which evidences a legislative intent that the secretary, not a member of the board, shall hold office only so long as all commissioners shall continue to so will it. Once the board, by unanimous action, has waived the requirement that a secretary be a member of the board, such waiver is effective so long as such secretary holds office without regard to any change of members of the board. There is no provision in the law which authorizes or prescribes a procedure for an individual commissioner to withdraw his consent from the waiver theretofore granted by the board as a whole. Hence, the secretary may be removed only by a vote of a majority of the board at a meeting of the board duly held.

CONCLUSION

It is the opinion of this office that the president, vice-president and secretary of special road districts, organized under Sections 233.170, RSMo 1959 et seq. are not elected for a definite term but serve at the pleasure of the board and may be removed from office only upon a vote of the majority of the members of the board voting at a meeting duly held. The secretary of such a board, not a member thereof and who was elected by unanimous vote of the commissioners may also be removed only upon vote of majority of the board voting at a meeting duly held.

The foregoing opinion, which I hereby approve, was prepared by my assistant Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

SHERIFF:
COUNTY COURT:

Section 57.445 V.A.M.S. 1960 Pocket Part, is interpreted as conferring discretion upon the county court of second, third and fourth class counties to determine whether sheriffs in such counties should be provided living quarters.

January 26, 1961



Honorable William E. Seay
Prosecuting Attorney
Salem, Missouri

Dear Mr. Seay:

This will acknowledge receipt of your letter dated January 13, 1961, in which you request an official opinion from this office. Your letter is as follows:

"I have been asked by the sheriff of Dent County to write you with reference to the construction given by your office to Chapter 57, Section 445 of the 1949 Revised Statutes. Sheriff Blackwell wishes to know if it is mandatory or discretionary with the County Court to pay him for the rental of a dwelling.

If you have any previous opinions construing this section, I will be happy to receive them."

This office has not previously construed Section 57.445 V.A.M.S. 1960 Pocket Part (all statutory references shall be to V.A.M.S. unless otherwise designated). This section reads as follows:

"In all counties of the second, third, and fourth classes, the county court may provide living quarters for the sheriff, in addition to the compensation authorized by law."

This statute was approved by the Sixty-Eighth General Assembly of the State of Missouri on July 7, 1955, Laws 1955, p. 352 §1. The enactment of this statute also repealed Section 57.420 which dealt with the same subject matter. This section is as follows:

"In addition to the compensation provided in sections 57.390 and 57.400 the county court may, in its discretion, furnish living quarters for the sheriff."

It thus becomes imperative that both of these statutes be read together. Section 57.445 replaced section 57.420 and included second class counties within the provision allowing County Courts of third and fourth class counties to provide living quarters for sheriffs. The language of the two statutes differ somewhat when they empower the county court with the authority to supply these accommodations. In the earlier statute it says "the county court may, in its discretion, furnish living quarters for the sheriff." While in the present statute it says "the county court may provide living quarters * * *". Does the elimination of the phrase "in its discretion" substantially change the meaning of the statute? Are the county courts mandatorily required to supply living quarters for sheriffs in second, third and fourth class counties? It is the opinion of this office that these questions should be answered in the negative.

The above statement is based upon not only the legislative history of Section 57.445, supra, but also upon the interpretive legislative intention of the word "may". The use of this word has an ordinary and generally accepted meaning and the presumption is that the legislature intended this word to be taken in its plain and usual sense, Section 1.090 V.A.M.S. At 82 C.J.S., Statutes §380, p. 877 it is stated that, "As a general rule the word 'may' when used in a statute, is permissive only, and operates to confer discretion, * * *." This same general provision is found at 50 Am Jur., Statutes § 28, p. 50 where it says that "* * * a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word 'may', * * *". The word "may" was analyzed in Lansdown v. Faris, 8th Circuit Court of Appeals, 66 F. 2d 939. At page 941 the court said "This word, in ordinary meaning, carries no thought of compulsion--- it is permissive or power giving and not at all compelling, discretionary and not mandatory. [citing cases]." Many cases support the proposition that where public authorities are authorized to perform an act to the benefit of an individual, then the word "may" is not interpreted to mean "must", but confers broad discretion upon such public authority as to whether the allowance should be made and to what extent. An illustrative case is Whitehurst v. Singletary, 77 Ga. App. 811, 50 S.E. 2d 80. In this case the Georgia Court said at 50 S.E. 2d, loc. cit. 84, "May ordinarily denotes discretion when used in a statute." For Missouri cases which support the above theory see State ex rel McClure v. Dinwiddie, 358 Mo. 15, 213 S.W. 2d 127; and State ex rel Fawkes v. Bland, 357 Mo. 634, 210 S.W. 2d 31.

Honorable William E. Seay

CONCLUSION

Section 57.445 V.A.M.S. 1960 Pocket Part, is interpreted as conferring discretion upon the county court of second, third or fourth class counties to determine whether sheriffs in such counties should be provided with living quarters.

The foregoing opinion, which I hereby approve, was prepared by my assistant Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:ms

December 13, 1961



Mr. V. H. Simon, Chairman
Wilson's Creek Battlefield National
Park Commission
c/o The Southern Missouri Trust Company
Springfield, Missouri

Dear Mr. Simon:

This refers to your letter requesting an opinion concerning expenditures which may be made by the Wilson's Creek Battlefield National Park Commission from the appropriations made for the commission in Section 24, Conference Committee Substitute For House Bill No. 758, 71st General Assembly, which reads as follows:

"Section 24. To Wilson's Creek Battlefield National Park Com- mission	
For acquisition of sites, as provided by law	\$350,000
For expenses of Commis- sion	1,800
Total from General Revenue	\$351,800

This appropriation is contingent
on enactment of Senate Bill 254 of
the 71st General Assembly."

The Wilson's Creek Battlefield National Park Commission was created by Senate Bill No. 254, 71st General Assembly. While the commission has certain other duties, the major function of the commission is stated in paragraph (1) of Section 4 of that Bill, which reads as follows:

"(1) To acquire and convey to
the United States of America or
any of its agencies such lands
and improvements thereon and any

monuments as may be designated by the United States of America or any of its agencies for inclusion in the Wilson's creek battlefield national park pursuant to Public Law 86-434 of the 86th congress of the United States, which established the park;"

You state in your letter that the National Park Service has designated for inclusion in the proposed park approximately 1700 acres of land, consisting of approximately Thirty-seven separate tracts and ownerships.

Your basic question is whether the expenditures of the commission which may be charged to the \$350,000 appropriation for acquisition of sites are restricted to amounts paid to the owners of land acquired by the commission or whether other expenditures made in connection with the acquisition of land may also be charged to such appropriation.

As originally introduced Senate Bill No. 254 had appended to it the following "Fiscal Note" furnished by the State Division of Budget and Comptroller:

"The cost of land acquisition authorized by this bill is estimated at \$350,000. Expenses of the Commission, assuming an average of one meeting a month at \$15 a day for each of the 5 members, would be \$1,800 for the biennium, for a total cost of \$351,800."

It is significant that the appropriations made for the commission were in the same amounts as, and obviously were based upon, the estimates contained in said "Fiscal Note." Also, in the "Fiscal Note", the \$1800.00 estimate of expenses of the commission apparently was calculated on the basis of the amounts which might be payable to members of the commission in reimbursement "for their actual and necessary cost of meals, lodging and travel expenses while engaged in performing commission business," to which the members of the commission are entitled under Section 3 of Senate Bill No. 254.

The acquisition of land by the commission necessarily will involve expenditures other than amounts paid to owners of the land acquired. Section 5 of Senate Bill No. 254 requires that before the commission buys any land it shall cause an appraisal of the same to be made by three qualified and impartial appraisers; and such appraisers will have to be compensated by the commission. As a practical matter and in accordance with the express provisions of Section 6 of Senate Bill No. 254, the commission, before acquiring land, must satisfy itself as to the title thereto; and this may involve expenditures for abstracts of title, title opinions, or title insurance. In some instances, it may be necessary to have surveys made in order to ascertain the correct descriptions and to be satisfied concerning titles. The commission is authorized to condemn land and any such action will require, as a minimum, expenditures for court costs which will have to be paid by the commission as a part of the court's judgment. Condemnation may also involve other expenses, including attorneys' fees, if the commission employs its own attorneys to institute the proceedings, as it is authorized to do.

It is our opinion that these and other expenses reasonably related to the acquisition of land can properly be construed to be a part of the cost of acquisition of the land and to be chargeable to the \$350,000.00 appropriation for acquisition of sites. It is believed that such a construction is necessary in order to conform to the legislative intent, taking into consideration the manner in which the \$1800.00 appropriation for expenses of the commission was calculated, the fact that such \$1800.00 appropriation would be clearly inadequate if expenses of the kind described above were required to be charged to it, and the fact that a contrary construction of the law probably would prevent any significant acquisition of land by the commission during the current biennium.

Reimbursement of members of the commission for meals, lodging and travel expenses should, of course, be charged to the \$1800.00 appropriation and any other expenses of the commission not reasonably re-

Mr. V. H. Simon, Chairman

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lated to the acquisition of land should likewise be charged to that appropriation.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

cc. to Ray Daniel
John K. Huston
Frank C. Mann

COUNTY HOSPITALS: Employer of County hospital employees is not
INCOME TAX WITHHOLDING: authorized to deduct and retain a percentage
COUNTY COURTS: of the state income tax withheld from
employees wages.

October 11, 1961



Honorable Ralph E. Smith
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Mr. Smith:

This is in reply to your request for an opinion of this
office dated August 23, 1961, which reads as follows:

"The recent Bill providing for the withholding of State income tax has been brought to the writers attention by the Directors of the Bates County Memorial Hospital. The Bill provides for the withholding of the taxes by the State of Missouri and all political subdivisions thereof and all agencies or instrumentalities of the State. Under Section 7, subparagraph 2, the Bill provides that the employer, other than the United States and its agencies, the State of Missouri and political subdivisions thereof, may deduct and retain the stated percentages of the total tax withheld and paid annually. The question raised by the Directors of the Hospital is whether the hospital constitutes a political subdivision of the State and whether or not they may retain the stated percentages of the tax withheld."

In answering this question, we first call your attention to that part of paragraph 4 of Section 205.190 RSMo 1959, which reads as follows:

Honorable Ralph E. Smith

"* * * provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

We are enclosing a copy of a previous opinion of this office dated December 11, 1943 and issued to Honorable George Adams, Prosecuting Attorney, Mexico, Missouri, and a copy of an opinion of this office dated August 9, 1955 and issued to Honorable Wayne W. Waldo, Prosecuting Attorney, Pulaski County, Waynesville, Missouri.

It is clear from these opinions that the wages paid to the hospital employees are paid from county funds and they are obligations of the county which are to be paid by the county court upon properly authenticated vouchers.

The bill referred to in your opinion request is House Committee Substitute for House Bill No. 30, 71st General Assembly. Paragraph 5 of Section 1 of that bill defines an employer and then states:

"* * * except that if the person or organization for whom the individual performs service does not have control of the payment of compensation for such service, the term 'employer' means the person having control of the payment of the compensation. The term includes the United States, the state and all political subdivisions thereof and all agencies or instrumentalities of any of them;"

Section 2 of that bill then provides for the employer to deduct and withhold and pay over to the Director of Revenue the amount of the tax as provided by the bill.

The above quoted exception to the definition of the term "employer" in House Committee Substitute for House Bill No. 30, strengthens the view that the county is the employer and that the county is the proper organization to withhold the tax and pay it over to the Director of Revenue.

Honorable Ralph E. Smith

The provisions for the retention of stated percentages of the tax withheld by employers, with certain exceptions, are found in paragraph 2 of Section 7 of House Committee Substitute for House Bill No. 30 which reads as follows:

"2. For every remittance to the director of revenue made on or before the date the remittance becomes due, the employer, other than the United States and its agencies, the State of Missouri and political subdivisions thereof, may deduct and retain the following percentages of the total amount of tax withheld and paid annually:"

It is clear that a county is a political subdivision of the State of Missouri and therefore is not authorized under the exception in paragraph 2 of Section 7 of House Committee Substitute for House Bill No. 30 to deduct and retain a percentage of the tax withheld.

It is our opinion that the county is the employer of the hospital employees, and it is not necessary to determine whether the Bates County Memorial Hospital is a political subdivision or an agency or instrumentality of a political subdivision. Since the county and not the trustees of the hospital are the proper officials to pay the salary and withhold the tax in the first instance, the hospital trustees are not authorized to retain a percentage of the tax withheld.

CONCLUSION

The employer of county hospital employees is not authorized to deduct and retain a percentage of the total amount of tax withheld under House Committee Substitute for House Bill No. 30 of the 71st General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WW:sa

Enclosures

November 17, 1961

Honorable Ralph E. Smith
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Mr. Smith:

This is in response to your letter concerning the responsibility of landowners to remove brush and weeds between their fences and public roads.

I enclose herewith an opinion of this office issued at the request of Honorable Joe H. Miller under date of November 1, 1954 which construes Section 229.110 as being limited to fences composed of Osage Orange.

Our search of Missouri Law on this subject fails to reveal any obligation on the part of owners of land along public highways to remove brush and weeds growing on the rights of way or outside of their fences.

Very truly yours,

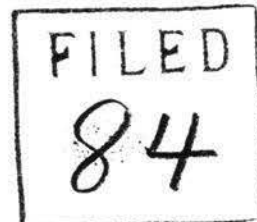
THOMAS F. EAGLETON
Attorney General

AJS:aa

Enclosure

VACANCY IN OFFICE: Resignation of sheriff should be addressed to
SHERIFFS: County Court, and is effective upon its acceptance
NOMINATIONS: by such county court, but not before the time
SPECIAL ELECTIONS: specified in the resignation. No steps may be
RESIGNATION: taken to fill the vacancy prior to the effective
date of the resignation. When special election
is required, notice thereof must be published
at least once in some newspaper published in the
county at least 20 days before the date of election.
The county central committee of each political
party may nominate the candidate of such party
and independent candidates may also file for the
office by obtaining sufficient signatures on
nomination petitions.

June 13, 1961



Honorable Edward Speiser
Prosecuting Attorney
Chariton County
Salisbury, Missouri

Dear Sir:

You have recently requested an opinion as follows:

"I would like to have an opinion from your office in regard to proper procedure with respect to the following situation that confronts us in Chariton County.

Mr. Cleve Iman, elected, qualified, and acting sheriff of Chariton County, has indicated his intention to resign his office as sheriff effective July 1. He has filed with the Clerk of the County Court of Chariton County, a notice to that effect. This notice is addressed 'To Whom it May Concern'. The only authority I have been able to find in regard to procedure, is the authority contained in Section 57.080 of the Missouri Revised Statutes of 1959. This Section fails to state any particular procedure to be followed in effecting a resignation. I would like to have answers to the following inquiries:

1. We would like to know exactly to whom such resignation should be addressed, whether to the County Court, Governor, or possibly some other official.

Honorable Edward Speiser

2. The steps or mechanics required in the acceptance of such resignation to make it effective.

3. Can such resignation become effective immediately upon filing same with the proper official, or does it become effective on its acceptance by the proper official, or is there a specific or minimum waiting period before it can become effective and the office thereby vacated.

4. In the event a period of time must elapse between the filing of the resignation and its effective acceptance, would it be proper to hold an election to fill the office prior to the acceptance of the resignation and its becoming effective. Also, is it proper to order the election and set the election machine in motion prior to the resignation becoming effective and the office becoming vacant.

5. Since the resignation is being filed at this time and assuming that the resignation became effective prior to a time which is more than nine months preceding the next regular election, which will be in August, 1962, the matter of procedure to be followed by the various parties that may desire to place a candidate on the ticket, or in case there are independent candidates, is a matter of much interest and concern. I would like to know the procedure to be followed by the political parties in placing a candidate on the ticket and also the procedure to be followed in placing the name of an independent candidate on the ticket.

6. When a special election is called to fill the vacancy by the resignation of the sheriff's office, how long must such election be advertised, how often must it appear in the weekly issues of our local papers, and must such advertisement be inserted in all the papers published in this county. We have three papers in this county and they are all published weekly."

It would appear from your letter that the sheriff of Chariton County has not yet resigned, but that he has merely given notice of an intention to do so at a later date. This opinion is written on the assumption that a resignation will be forthcoming from said sheriff expressly resigning from the office of sheriff.

Honorable Edward Spieser

Article IV, Section 4 of the Constitution provides that the governor shall fill all vacancies in public offices "unless otherwise provided by law." Section 57.080, RSMo 1959, makes specific provision otherwise for filling a vacancy in the office of sheriff, and therefore the governor has no power to fill a vacancy in the office of sheriff. This statute provides in part as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happens more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, * * *"

As appears from the foregoing statute, the power is granted to the county court to fill a vacancy in the office of sheriff.

The rule followed in Missouri is that a resignation, in order to be operative, should be communicated to the officer or body having the power to fill the vacancy. In State ex rel Buskirk v. Boecker, 56 Mo. 17, which involved the resignation of a county clerk, the Court held as follows:

"As by the terms of the law, the Governor alone has the authority to make the appointment in case of a vacancy, it would seem to follow, that in order to make the ~~resignation~~ resignation operative, it should be addressed to him. This is unquestionably the general principle, that when power is bestowed upon a particular officer, when a vacancy occurs, to fill the same by appointment, that the resignation should be sent to him that he may accept it, and then proceed to the discharge of his functions in the premises."

In State ex rel Kirtley v. Augustine, 113 Mo. 21, 20 S.W. 651, the same principle was applied. The question there was when the office of county treasurer became vacant. The treasurer tendered his resignation to the county court, which had no authority to act upon it, but with the consent of the treasurer the resignation was certified to the Governor who then appointed a successor. Before the commission was actually issued, the treasurer attempted to withdraw his resignation. The court held that he could not do so. The court laid down the following rules of law which are applicable to the question you have posed:

"It is well-established law that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dill. Mun. Corp. (3d Ed) § 224, Mechem, Pub. Off § 413; Van Orsdall v. Hazard, 3 Hill, 243; State v. Boecker, 56 Mo. 17. By section 11, art. 5, Const. Mo., it is provided that, "when any office shall become vacant, the governor, unless otherwise provided by law, shall appoint a person to fill such vacancy," etc. It seems that no provision exists in our statutes for filling the vacancy of county treasurer. Hence it follows that the power of appointment remains, as directed by the constitution, with the governor; and the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order, then, to create a vacancy in the office held by Augustine, his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office; that this purpose be communicated to the proper authority; and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. Edwards v. U.S., 103 U.S. 471, 474; People v. Board, 26 Barb. 502; Mechem, Pub. Off. § 414 et seq. When this resignation shall have been communicated to the proper authority, and the same shall be accepted, -- whether formally or by the appointment of a successor, -- it is beyond recall. It cannot then be withdrawn."

Inasmuch as the county court has the sole right to fill the vacancy by appointing some person to hold the office until such time as an election shall be held, it is the opinion of this office that the resignation of the incumbent sheriff should be addressed to the county court, and that such resignation to be effective should be accepted by the county court. Such acceptance should be noted by an order of record, although under the authorities the mere act of appointing a successor itself operates as an acceptance of the resignation. There are no particular steps or mechanics required in order to accept the resignation. As the Kirtley case holds, all that is necessary is that the incumbent

Honorable Edward Spieser

communicate his purpose to relinquish his office to the proper authority and that such authority accept the same, either formally or by the appointment of a successor.

The foregoing cases point out that the word "vacant" means "empty, unoccupied, as applied to an office without an incumbent." "An incumbent of an office is one who is legally authorized to discharge the duties of that office." State ex inf. McKittrick v. Wilson, 350 Mo. 486, 166 S.W. 2d 499, 502. So long as there is an officer in possession of the office it may not be said to be vacant. Hence, if Mr. Iman resigns now, effective July 1, 1961, and this resignation is accepted, there would be no vacancy in the office prior to July 1. If on July 1 Mr. Iman should resign effective forthwith, even then there would be no vacancy until such time as the resignation was actually accepted.

There is no provision in our statutes which authorizes anyone to fill a vacancy prior to the time such vacancy actually exists. It is the fact of vacancy which creates authority on the part of the proper official or body to fill the same. The power granted to the county court by Section 57.080, RSMo 1959, comes into existence whenever the office of sheriff "becomes vacant". Hence, until such time as the vacancy actually occurs, the county court is without authority to act with respect to the office. In State ex rel Berry v. McGrath, 64 Mo. 139, the Court expressly held that a resignation to be effective on a future date did not take effect until such date no matter when it was accepted, and that the office did not become vacant prior to such date. The court ruled this matter as follows:

"* * *Now, notwithstanding the fact that Judge Henry's resignation was transmitted to the governor in July, 1876, he continued to be judge of the 27th Judicial Circuit until the 31st day of December, 1876. On that day, and not before, did his resignation take effect, no matter when it was accepted by the governor. From that day, and not before, did his office become vacant. * * *

In the Berry case an election was held prior to the effective date of the resignation, for the purpose of electing a successor. The court ruled that "it is quite plain that no election could be held * * * for a successor * * * until after the office * * * became vacant. * * * As the relator claims to have been elected prior to that time, he was elected before any vacancy existed and without authority of law."

Honorable Edward Speiser

It is the further opinion of this office that no election may be ordered to fill the vacancy prior to the time such vacancy actually exists, and that cannot be until after the effective date of the resignation and its acceptance by the county court. Section 57.080, RSMo 1959, requires the county court to appoint some person whenever the office "becomes vacant", and then to call a special election (when the "vacancy happens more than nine months" before the next general election) to fill the "vacancy". This can mean only that there is no authority to act at all prior to the occurrence of the vacancy. This conclusion is fortified by the further provision that "upon the occurrence of such vacancy," the presiding justice of the county court must call a special term thereof if the court is not then in session for the purpose of causing the election to be held.

Under the facts stated in your request for an opinion, the resignation will be effective more than nine months prior to the time of holding the next general election, and therefore the statutory provisions applicable to calling a special election will become operative. In the meantime, and immediately upon the vacancy occurring, it is the duty of the county court to appoint some person to fill the vacancy in office until the election is held.

Section 57.080, RSMo 1959, provides with respect to the special election that it be held within 30 days after the vacancy occurs and that "notice" of such election be given. With respect to notice, it is provided only that the same shall be published in "some" newspaper published within the county. It is further provided that if there should be no newspaper published in the county then the notice shall be given by ten handbills posted in ten of the most public places in the county for twenty days prior to holding the election. The facts as stated in your letter disclose that there are three weekly newspapers in your county.

It is the opinion of this office that since the statute requires only that there be publication of "notice" in "some" newspaper, the statute will be complied with if the notice is published in any one of the three newspapers at least once. The statute does not expressly state the period of time prior to the election that such notice must be published, but since the statute does require handbills to be posted for twenty days prior to the holding of the election, it is the opinion of this office that the most reasonable construction of the language employed is the published notice must be given at least 20 days prior to the day of the election. We also deem it desirable that if possible the notice be published in each issue of the newspaper after the election is called and prior to the date of such election.

Honorable Edward Speiser

Section 57.080, RSMo 1959, provides that the special election shall be held in pursuance of said statute and the laws governing general elections in this state. An examination of such laws discloses that there is no express provision which governs the procedure to be followed in placing the names of candidates on the ballot at a special election. Section 120.150, RSMo 1959, provides in part that political parties and individual voters to the number and in the manner specified in Section 120.140 to 120.230 may nominate candidates for public offices. In the case of *State ex rel Preisler v. Toberman*, 364 Mo. 904, 269 S.W.2d 753, 1.c. 755, the court held that the provision of this statute as to "methods" of nominating candidates does not apply to established political parties. In this connection, the court held that "as to parties [the statute] merely says no more than that political parties may nominate candidates for public offices." This means that political parties have the statutory right to nominate candidates for a public office. However, the method of exercising such statutory right in the instant situation is not expressly provided for.

The primary election law contains provisions for filling vacancies in nominations. However, Section 120.300, RSMo 1959, provides in terms that Sections 120.300 to 120.650, RSMo 1959, (the entire primary law) "shall not apply to special elections to fill vacancies". The Supreme Court in *State ex rel Wagner v. Patterson*, 207 Mo. 129, 105 S.W. 1048, 1.c. 1054, with respect to a special election to fill a vacancy in the office of sheriff so held as follows:

"During the oral argument of the cause some question was raised as to whether or not the general primary election laws enacted in 1907 (Laws 1907, pp. 263-270) would apply to this election, if ordered. In reply to that suggestion, we will state that section 1 of that act expressly exempts from its operation all special elections to be held to fill vacancies in office, which, of course, includes those held to fill vacancies in the office of sheriff."

Section 120.750, RSMo 1959, provides in part as follows:

"The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the party." * * *

Our Supreme Court has consistently ruled that statutory limitations upon the rights of political committees are not to be extended to

Honorable Edward Speiser

prevent such committees from making nominations in any situation not expressly covered by the particular statutory limitations. Among such cases are State ex rel Hayden v. Thomas, 353 Mo. 332, 182 S.W.2d 584, State ex rel Shumard v. McClure, 299 Mo. 688, 253 S.W. 743 and State ex rel Punch v. Kortjohn, 246 Mo. 34, 150 S.W. 1060. In the Hayden case, an incumbent justice of peace died shortly after the primary election, thereby creating a vacancy in that office. No candidate was nominated at the primary because there was no vacancy and the incumbent had more than two years yet to serve. The statute had been amended to provide that vacancies occurring after the holding of any primary, and resulting from death or resignation and not otherwise, in said nomination of such party at the primary shall be filled by the party committee. Previous to the amendment the statute had given the central committee power to fill vacancies "where no person shall offer himself as a candidate before such primary." The court held, 182 S.W.2d 1.c. 586, that although the statute should be construed to further the legislative intent "to encourage the selection of candidates by the electors of a party rather than by the central committee", nevertheless "it does not follow that the central committee has been deprived of the power to select a party candidate for an office which must be filled at the general election, but which could not have been voted at the primary." The court ruled as follows:

"Our laws recognize political parties as useful adjuncts to our system of government. Accordingly, while preserving the right of candidates to run for office independently, we have enacted laws regulating nominations by political parties. It is the policy of those laws to require party nominations to be made by the electors of the party where possible, but we do not think the law prevents a political party from making nominations by its duly constituted committee when it has had no opportunity to make them by its electors at the regular primary. In other words, the state primary law is inapplicable to nominations for vacancies in office occurring too late to be voted on at the state primary. Formerly such vacancies were filled at special elections and nominations therefor were made by or under the direction of party committees. Under present statutes such vacancies are filled at the next general election, but Section 11546 still provides that the state primary law 'shall not apply to special elections to fill vacancies.' Considering all the statutes mentioned, we think the state primary law provides the method for nominations to all offices to be filled at the ensuing general election, except as to vacancies occurring too late to be voted on at the state primary."

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The foregoing cases constitute authority for the proposition that in all situations where the state primary law is not applicable to nominations for vacancies in office, party committees have the right to make such nominations on behalf of their respective parties. That is to say, where the rank and file of the party have no opportunity to nominate the candidate of such party, and the law specifies no other method, then the duly constituted committee of such party may make such nomination on behalf of the party.

It is the opinion of this office that inasmuch as the state primary law has no application to special elections, and there being no other statute which purports to deprive the county central committee of its power to represent and act for the party members in such situation, the county central committee of each of the established political parties in Chariton County is entitled to nominate the candidate of such party for the office of sheriff to be voted on at the special election to be held to fill the vacancy.

Section 120.180, RSMo 1959, provides the method for placing the names of independent candidates on the ballot. It provides in effect that such nominations may be made by nomination petitions signed by qualified voters of the county, equaling not less than 2% of the number of voters who voted for county officers at the next preceding general election. The form and content of such petitions are set forth in Sections 120.190 to 120.210, RSMo 1959.

It is to be noted that Section 120.220, RSMo 1959, provides that petitions for nomination for county offices shall be filed with the county clerk "at least seventy-eight days previous to the day of election." In the opinion of this office, said Section 120.220, RSMo 1959, has no application to special elections, and that the clear intent thereof is that it apply only to general elections for which the normal primary elections are to be held. The time provision of said section fits into the pattern whereby party nominations for candidates to be voted on at such general elections are also made well in advance of the general election. In any event, we believe that such time provisions are directory insofar as they may be held applicable to special elections. Our Supreme Court in *State ex rel Borgelt v. Pretended Consolidated School Dist. No. 3 of St. Charles County*, 362 Mo. 249, 240 S.W.2d 946, 1.c. 950, has laid down the following rules in construing statutes:

"The primary purpose of statutory construction is to ascertain and give effect to the expressed legislative intent. * * * Generally statutory provisions relating to the essence of the thing to be performed or to matters of substance are considered mandatory, while those which do not relate to the essence and where compliance is merely a matter of convenience rather than substance are considered directory."

Honorable Edward Speiser

In State ex rel Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104, the foregoing principle was applied by the Supreme Court in holding that a statutory provision requiring persons seeking registration as absentee voters to appear before the board of election commissioners on designated days of the week prior to the election was directory.

If the time limitations contained in Section 120.220, RSMo 1959, are held to be mandatory as applied to special elections, such a construction would raise serious constitutional doubts as to the validity of the statute. Inasmuch as a special election for the office of sheriff must be held within 30 days after the vacancy occurs, then it would never be possible for an independent candidate to ever have his name on the ballot if the statute were held applicable. The constitutional guaranty of free and open elections contained in Section 25, Article I of the Constitution is held to guarantee the right of every eligible person to become a candidate for an office. This principle was recently stated in Preisler v. City of St. Louis, 322 S.W.2d 748, 1.c. 753 as follows:

"We agree that every eligible person has the right under the constitutional guaranty of free and open elections to become a candidate for office, Preisler v. Calcaterra, 362 Mo. 662, 243 S.W. 2d 62, 64; State ex rel Haller v. Arnold, 277 Mo. 474, 210 S.W. 374, 376 [3]; and that restricting that constitutional right in such a manner as to effectively deny or improperly impede it is a violation of the guaranty, State ex rel. Preisler v. Woodward, 340 Mo. 906, 105 S.W.2d 912, 914 [4,5]; State ex rel. Haller v. Arnold, supra, 210 S.W. 376 [2]."

CONCLUSION

It is the opinion of this office as follows:

1. The resignation of a sheriff should be addressed to the county court.
2. Said resignation is effective upon its acceptance by the county court but not before the time expressed in said resignation.
3. No particular steps or procedure is required in order to accept such resignation, but preferably the acceptance should be by an order to such effect entered of record.

Honorable Edward Speiser

4. No steps may be taken to fill the vacancy or to nominate candidates, preliminary or otherwise, until such vacancy actually occurs, which cannot be prior to the effective date of the resignation.

5. When the office of sheriff becomes vacant the county court is required to appoint some person to fill such vacancy until a successor is duly elected and qualifies. Where the vacancy occurs more than nine months before the next general election, a special election must be called within 30 days after the vacancy occurs. Notice of such special election must be published at least once in some newspaper published in such county, and the first such publication must be made at least 20 days before the date of the election.

6. The county central committee of each political party may nominate the candidate of such party for the office of sheriff, and independent candidates may also file for such office by obtaining the requisite number of signatures on nomination petitions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

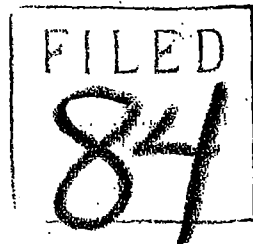
THOMAS F. EAGLETON
Attorney General

JN:ms

By _____
Julian L. O'Malley
Assistant Attorney General,

Acting Attorney General

December 26, 1961



Honorable Edward W. Speiser
Prosecuting Attorney
Chariton County
Salisbury, Missouri

Dear Mr. Speiser:

This is in response to your letter of December 20, 1961, concerning the imposition of penalties provided for in Section 302.321 and whether or not such penalties apply only to nonresidents.

Section 302.321, as amended by the General Assembly in 1961, clearly applies to both residents and nonresidents. As the plain meaning of the language used indicates: "Any person whose operator's or chauffeur's license, or driving privilege as a nonresident, has been canceled, suspended or revoked as provided in this chapter. . . ." This clause refers to three things: (1) Revocation of an operator's license, (2) revocation of a chauffeur's license, and (3) revocation of nonresident driving privileges.

The section goes on to provide for a penalty of not more than one year in jail, and further provides that the section quoted shall not be imposed against those whose operator's license, chauffeur's license, or nonresident driving privileges have been canceled, suspended or revoked under the terms of Chapter 303, RSMo 1959.

Trusting that this will suffice to answer your question, I am

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HLMcF:ml

OFFICERS:
CONSTITUTION LAW:
CENSUS:

Compensation of County Officers whose salaries are fixed in relation to population by statute in effect at date of their election must be increased or decreased in accordance with such statutory classification. Greater compensation is not an increase within the meaning of Article 7, Section 13 of the Constitution. 1960 census effective as of Jan 1, 61, for purpose of ascertaining county officers' compensation. As to incumbent officers paid on annual basis whose term commences on a date other than Jan 1, any change in compensation effective with next year of incumbency commencing after January 1, 1961.

January 26, 1961

Mrs. G. B. Stewart
Prosecuting Attorney
Douglas County
Ava, Missouri



Dear Mrs. Stewart:

By your letter of January 10, 1961, you request an official opinion answering the following question:

"All of the county officials have been trying to ascertain when the change in salary is effective. Due to the last census it appears they will have to take a cut. Since taking office last week I have been too busy in court to try to find out what salary I am to receive -- I know its insufficient to hire a good secretary--but I was elected before I thought to inquire the salary. It seems to be almost nonexistent.

We shall appreciate an opinion as to when the change is effective."

As we construe the question upon which the opinion is requested, it is essentially as follows: Where a law in force at the time of the election of an official has fixed his salary on the basis of population, should the amount of compensation payable be changed as such population changes from time to time, and if so what is the effective date of such change in compensation?

In the case of State ex rel Moss v. Hamilton, 303 Mo. 302, 260 SW 466, the Supreme Court ruled that where a statute in force at the time of the election of an official fixed the method of computing the compensation of such official according to population, such statute necessarily fixed the compensation for the whole term in accordance with the population as ascertained from time to time, so that in the event of a change of population there is neither an increase nor decrease in salary even though the amount paid to the official is

Mrs. G. B. Stewart

different in amount by reason of the change in population. In either event, the amount payable was fixed by a formula in effect at the time of his election. The constitutional prohibition against an increase in compensation applies only to a law effective as such after the term of the officer has commenced. The Supreme Court ruled this question in the following language (underscoring ours):

"* * *This act of 1915 was in effect when relator was elected. Under it, relator's salary was fixed for his whole term, but was not in named dollars and cents for the whole term. The effect of this act of 1915 was to say to relator, 'Your salary shall be determined upon the presidential vote of 1916 until there is another presidential election, at which time your county may be in a lower or higher class, according to the population indicated by the presidential vote.' The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So too, if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher, but it was definitely fixed at the date of his election. If the act of 1915 had said that the circuit clerk of Crawford county, elected in 1916, shall receive \$1,600 per year for the first two years, and \$1,950 per year for the last two years of the term there would be no question. Section 8 of article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the act of 1915 as it now stands is no nearer a violation of section 8 of article 14 of the Constitution, than the supposed law. * * *"

So, too, in State ex rel Harvey v. Linville 318 Mo. 698, 300 S.W. 1066, the Court stated the rule as follows:

"The increase of salary which a statute permits after an election showing an increase of population is not in violation of the Constitution,

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in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population. State ex rel. v. Hamilton, 303 Mo. 302, 260 S.W. 466."

It is the opinion of this office, therefore, that the compensation payable to the official should be based on the population as it appears from time to time during his term of office in accordance with the formula prescribed by the statute in effect at the time of such official's election and that any change resulting from the application of this formula, whether it result in an increase or a decrease in the amount of salary payable is neither an increase of compensation within the meaning of Section 13, Article 7 of the Missouri Constitution of 1945, nor a decrease.

Section 1.100 V.A.M.S., Pocket Part, Laws 1959, provides as follows:

"1. The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961. * * *

Prior to the Laws of 1959, Section 1.100 provided, in identical language, that for the purpose of ascertaining the salary of any county officer for any year or for the amount of fees he may retain the effective date of each decennial census shall be on January 1 of each tenth year after 1951, so that, insofar as concerns the effective date of the census for the purpose of ascertaining the salary, the statute is unchanged. It follows that under said Section

Mr. G. B. Stewart

1.100, the 1960 census became effective on January 1, 1961, and that the population as shown by such census is required to be used in determining the compensation thereafter payable to such county officer.

In this connection attention is called to the holding in State ex rel Harvey v. Linville, 318 Mo. 698, 300 S.W. 1066, that the word "annual" as applied to salaries means not the calendar years, but the years of the incumbent's term. The Court ruled this point as follows:

" * * * 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual', as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year. * * *"

The Linville Case was followed in Sims v. Clinton County, 320 Mo. 594, 8 S.W. 2d 69, 70.

Under these authorities an "annual" salary means the salary for each year of the incumbency. Hence, as to those officials whose term commences on January 1 of ~~any~~ year, the change in compensation is effective as of January 1 of this year. However, as to those officials whose terms commence on a date other than January 1st, the change in compensation is effective on the next anniversary date of the term. For example, if an official's term begins on April 1st, then the change in his "annual" salary would be effective as of April 1 rather than January 1, 1961.

CONCLUSION

It is the opinion of this office: (1) that a change in population resulting from the 1960 census requires a change in the compensation payable to County officers whose salary is fixed in relation to such population by a statute in force as of the date of any such officer's election, and this is true whether the result be an increase or a decrease in the amount payable to such officers; and (2) that the 1960 census became effective for the purpose of ascertaining the salary of such county officers as of January 1, 1961, but that as to any officer whose salary is fixed on an annual basis and whose term began on a date other than January 1, any such change in compensation is not effective until the

Mrs. G. B. Stewart

commencement of the next year of such officer's incumbency which begins subsequent to January 1, 1961.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Yours very truly,

Thomas F. Eagleton
Attorney General

JF:ms

FRANCHISE TAX:
TAXATION:
CORPORATIONS NOT
ORGANIZED FOR PROFIT:

FMSM Corporation is not a corporation not organized for profit within the meaning of Sec. 14.010, par. 3, RsMo 1959, and is liable for the payment of the annual franchise tax.

May 17, 1961



State Tax Commission of Missouri
Jefferson Building
Jefferson City, Missouri

ATTN: Mr. W. Arnold Brannock, Attorney

Gentlemen:

You have requested an opinion respecting the liability of FMSM Corporation to the Missouri franchise tax, as follows:

"The FMSM Corporation is a foreign corporation incorporated March 28, 1956, under the District of Columbia Business Corporation Act for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to certain qualified trusts, created by employers as part of stock bonus, pension or profit sharing plans for the exclusive benefit of employees and their beneficiaries. Said corporation has issued and there are outstanding one thousand shares of stock, all of which are held by the Chase Manhattan Bank through a nominee, as trustee of the Ford Retirement Trust, an approved trust under Section 401 of the Internal Revenue Code of 1954. All of the capital has been obtained from the trust.

"The corporation has acquired title to a number of automobile service stations which have been leased to Socony Mobile Oil Company, Inc. All of the income is turned over periodically to the trust. The corporation may have been ruled exempt from federal and Missouri income taxes, and claims that it is exempt from liability for payment of the Missouri franchise tax on the theory that it is a corporation not organized for profit. Under

State Tax Commission of Missouri

the foregoing facts submitted by the corporation we would like to know whether said corporation is exempt from liability for franchise tax as a corporation not organized for profit?"

Section 147.010, RSMo 1959, paragraph 2, provides that every foreign corporation engaged in business in this state shall pay an annual franchise tax. Paragraph 3 of Section 147.010 provides that "this law shall not apply to corporations not organized for profit." The question presented is whether the FMSM Corporation is exempt from liability for the payment of franchise tax on the theory that it is a corporation not organized for profit.

The facts stated in the request are that the corporation has invested funds in the acquisition of title to automobile service stations and that said service stations have been leased for the purpose of deriving income for the corporation. The corporation in turn pays the entire net income, less expenses, to the Ford Retirement Trust, presumably by declaring dividends on its capital stock all of which is held by the Chase Manhattan Bank, through a nominee, as trustee of the Ford Retirement Trust. The capital used for the business of the corporation has been obtained from the trust.

The fact that the corporation may be exempt from income tax liability is not in our view relevant in determining whether FMSM Corporation is a "corporation not organized for profit" within the meaning of Section 147.010, RSMo 1959. Income tax exemptions are determined under specific statutory provisions without regard to whether the corporation is in fact organized for profit.

With respect to exemption from federal income tax liability, Section 501 (c)(2) of the Internal Revenue Code of 1954 specifically exempts from federal income taxes "corporations organized for the exclusive purpose of holding title to property, collecting income therefrom and turning over the entire amount thereof, less expenses, to an organization which is itself exempt under this section." Thus, it is apparent that such exemption is not affected by whether or not the corporation "was organized for profit".

Missouri has a statutory provision somewhat similar to Section 501 (c)(2). Section 143.120, RSMo 1959, provides that "there shall not be taxed under this chapter any income received by any

(12) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title;"

State Tax Commission

Here too, such exemption is in nowise related to whether or not the corporation was "organized for profit". A further provision relating to income tax liability is Section 143.040, RSMo 1959, which exempts "corporations whose only activity is the investment or reinvestment of its own funds in ...real estate, leaseholds... and other interest in real estate, or holding ... real estate... leaseholds...or any other interest in real estate."

The foregoing should make it rather obvious that the basis of exemption from income tax liability is entirely different than the basis of the exemption granted certain corporations from franchise tax liability. The nature of its holdings and the disposition of its income are not statutory factors in determining the liability of a corporation to the franchise tax, as distinguished from its liability to income tax. A corporation is exempt from franchise tax liability only if it is not "organized for profit".

Your request for an opinion states that the FMSM Corporation was organized under the District of Columbia Business Corporation Act. A study of that act makes it clear that only "corporations for profit" come within the scope thereof. In Section 29-903 of the District of Columbia Business Corporation Act, it is provided "corporations for profit may be organized under this chapter for any lawful purpose or purposes except for the purpose of banking or insurance or the acceptance or execution of trusts, the operation of railroads, or building and loan associations."

Other provisions of the Act emphasize the fact that such Act pertains only to corporations for profit. Section 29-952 of the Act contains the following provision relating to reincorporation:

"Any corporation which is organized and existing under the laws of the District of Columbia on December 5, 1954, and which is organized for profit and for a purpose or purposes authorized by this chapter may avail itself of the provisions of this chapter and may become reincorporated hereunder in the following manner . . ."

Section 29-952 also contains the following provision relating to incorporation:

"Any corporation which is created under the provisions of a special Act of Congress to transact business in the District of Columbia for profit and for purposes authorized by this chapter may avail itself of the provisions of this chapter and may become incorporated hereunder in the following manner . . ."

State Tax Commission

FMSM Corporation is therefore by virtue of its organization under the District of Columbia Business Corporation Act a corporation admittedly "organized for profit". Moreover, this corporation is actually engaged in business in Missouri and under the facts stated in your request is in fact organized for profit. The word "profit" usually signifies gain realized from business and investments over and above expenditures. See *Sidney Smith Inc. v. Steinberg*, Mo. App., 316 SW 2d 243 which quotes definitions of "Profit" from 34 Words and Phrases, and also from Webster's New International Dictionary, 2d Ed., unabridged, "Profit". Webster's definition as quoted in that case is "The excess of returns over expenditure in a given transaction or a series of transactions."

There can be no reasonable doubt under the stated facts that the FMSM Corporation was organized in order to conduct a business for the purpose of realizing profit. The fact that such profit is ultimately paid over to a worthy beneficiary, if so, does not alter the fact that the activities of the corporation are those of a business corporation and that it was organized for the purpose of deriving as much income and profit as possible from its business operations. The corporation operates its business essentially the same as all other corporations of a similar nature organized for profit, and as such, it competes with other similar organizations.

CONCLUSION

It is our opinion that FMSM Corporation is not a corporation which is "not organized for profit" within the meaning of paragraph (3), Section 147.010, RSMo 1959, and that such corporation is liable for the payment of annual franchise tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

PROSECUTING ATTORNEYS:
BOGUS CHECKS:
MAILING CHARGES:
CRIMINAL LAW:

A prosecuting attorney sending notice to one pursuant to Section 561.470 VAMS on complaint of an insufficient fund check in violation of Section 561.460 VAMS, cannot charge to or demand of the complainant, the mailing charges thereof.

February 16, 1961

*Minico
capers*

Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Mr. Strom:

This is in response to your letter of January 11, 1961, wherein you requested an official opinion of this office concerning the following:

"This office, as is probably the case with many other prosecuting attorneys, has a large number of complaints filed with reference to insufficient funds checks. The practice of my predecessor in office has been that prior to filing charges under the 'insufficient funds check statute', section 561.460, notice be given to the drawer of the check by a registered letter, return receipt requested, by the prosecuting attorney advising that charges would be filed if the check is not paid within five days. The purpose of this notice, of course, is to obtain the benefit of the presumption of intent to defraud provided by Section 561.470.

"To send a notice to the drawer of the check, registered mail, with return receipt requested, to be delivered to the addressee only, costs \$1.14. In view of the considerable number of such letters which are sent the postage expense can become somewhat large.

"It has been suggested that the office of the prosecuting attorney make a charge of \$1.00 or \$1.25 to each person making a complaint

on an insufficient funds check to cover this expense. The use of these letters is the easiest method with which to prove notice to the maker of the check.

"I hereby request your opinion whether the prosecuting attorney may charge and collect a fee from each complainant on a bad check charge, such fee being sufficient to cover postage and registered mail charges which may be necessary in that particular case."

Basically the duties and obligations of Prosecuting Attorneys are derived from the Statutes of Missouri. It thus becomes necessary to examine said statutes in determining the extent of said duties and obligations.

Under Section 56.060 VAMS,

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the state or county may be concerned....."

Section 561.460, RSMo provides:

"Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer, has not sufficient funds in or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment."

Section 561.470, RSMo further provides:

"As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused

by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

It is to be noted that the statute is silent as to who shall give said notice, and in what manner said notice is to be given. The only purpose of the statute would seem to be a method of establishing prima facie evidence of drawer's intent to defraud when he has not paid instrument after five days notice. Said statute does not declare this method to be the sole and exclusive means whereby intent to defraud can be established, nor does it state that this notice must and can only be given by the prosecuting attorney to be an effective method of establishing this prima facie evidence of fraud. Furthermore, the statute does not indicate that said notice must be given in a particular manner.

In *State v. Kaufman*, 308 SW 2d 333, the St. Louis Court of Appeals, in interpreting Section 561.470, stated:

"This section of the statute establishes a rule of evidence. It provides that the failure of the defendant to pay the drawee bank the amount of the check after receiving five days notice that the check was not paid shall be prima facie evidence of fraudulent intent and knowledge on the part of the defendant of the insufficiency of his funds and his credit with the bank. Proof of the giving of the notice referred to in this statute is not an essential element of the offense. If the notice was not given the State had the right to prove fraudulent intent and knowledge of the insufficiency of funds or credit in some other manner. Failure to give the notice would merely prohibit the state from availing itself of the presumption created by the statute. Also, payment by the defendant within the five days would not be a defense to the charge. Such payment would only abrogate the presumption created by the statute. What we have just said may be unnecessary to the contention being examined but is important to another assignment to be discussed. This statute does not call for written notice. No doubt the Legislature was aware that there are many comparable statutes throughout the other states. Some specifically require a written notice and others do not. If a written notice was contem-

plated the Legislature would have so stated. We have found no case that holds a written notice is required under a statute similar to \$561.470." (underlining supplied)

Consequently the notice given to the drawer of the instrument by the holder thereof and one given by the prosecutor would differ entirely in its purpose.

Basically, the notice given by the holder is for the ultimate purpose of collecting the amount of the instrument unpaid in the hands of the holder. On the other hand, said notice given the maker by the prosecutor would have as its purpose establishing prima facie evidence of intent to defraud on the part of the maker. In the event the prosecutor gives written notice by registered mail with a return receipt, said method would prove that the notice had actually been received by the drawer of said instrument.

Said notice should never be given by a prosecutor to a drawer of an instrument for the purpose of collection, but rather to facilitate said prosecutor in the prosecution of said drawer for fraudulently uttering or delivering said instrument.

It therefore follows that said notice when given by the prosecutor is within the purview of his office as a public official for the people of his county, and not as a mere collection agent for the holder of the instrument. Prosecution furthers the public interest, rather than the private interest of the complainant.

Thus, any expense incurred by the prosecutor in sending said notice must be borne solely by him as an expense of his public office. Performance of his official duties should, in no event, be conditioned upon a private person bearing the expense incident thereto.

The notice, when used by the prosecuting attorney, should never be couched in language advising or intimating that charges will be filed or prosecution commenced if the check or draft is not paid within five days. Such language would clearly imply that in the event of payment within 5 days there would be no prosecution even though there may be actual intent to defraud. For payment by the drawer or maker within this five day period would only serve to do away with the presumption of intent to defraud created by the statute, but it in no wise completely destroys the prosecutor's right to prosecute said individual if he can otherwise prove the drawer's or maker's intent to defraud at the time said individual uttered or delivered said instrument.

As stated in STATE v. KAUFMAN, 308 SW 2d 333, loc. cit. 338:

" * * * Also, payment by the defendant within the five days would not be a defense to the charge. Such payment would only abrogate the presumption created by the statute."

The Missouri statutes contain express provisions regarding what equipment shall be furnished to county officers by his county as well as a classification of expenses:

VAMS Section 49.510:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

VAMS Section 50.680:

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six." (Underlining supplied.)

In this connection stamps, stationery and the like are expressly provided for by statute as a necessary expense of the maintenance of the office of Prosecuting Attorney.

Therefore it becomes incumbent upon the prosecuting attorney, within his discretion if he deems that the public interest will

be facilitated thereby, to bear the expenses of sending a notice pursuant to Section 561.470 VAMS by registered mail with a return receipt.

CONCLUSION

A prosecuting attorney sending notice to one pursuant to Section 561.470 VAMS on complaint of an insufficient fund check in violation of Section 561.460 VAMS, cannot charge to or demand of the complainant, the mailing charges thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George W. Draper, II.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

COUNTIES:
COUNTY COURTS:

County Court of County of 3rd Class has no power or authority to rent parking space for use of county officials while attending to their official duties at county courthouse.

March 9, 1961



Honorable Stephen A. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We have your recent request for an opinion as follows:

"I have been requested by the County Court of Cape Girardeau County to submit the following question to you for your opinion:

Can the county court rent parking space, to be used by various county officials while attending to their duties at the county courthouse, in a parking lot owned by private individuals or the chamber of commerce or city in which the county courthouse is located?"

Stated otherwise, the question is whether the County Court of Cape Girardeau County, a county of the 3rd class, has the power to rent property for the sole purpose of providing parking facilities for the use of county officials.

The law is well settled that County Courts have only such authority as is expressly granted them by statute, together with such implied powers as are essential to properly carrying into effect the purpose of the power specifically granted. This principle was stated in the case of King v. Maries County, 297 Mo. 487, 249 S.W. 418, 1.c. 420, as follows:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute.* * * This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. * * *"

Again in *Butler v. Sullivan County*, 108 Mo., 630 l.c. 637 18 S.W. 1142, the court stated:

"* * *If the county court had such power it must be because some statute conferred it; for we have repeatedly ruled that such courts are not the general agents of the counties or the state, and only have such authority as is expressly granted them by statute; beyond the limits of such grant their acts are void. * * *"

Section 49.310, V.A.M.S., provides in part as follows:

"The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county. In pursuance of the authority herein delegated to the county courts, said county courts may acquire a site, construct, reconstruct, remodel, repair, maintain and equip said courthouse and jail, and in counties wherein more than one place is provided by law for holding of court, the county court may buy and equip or acquire a site and construct a building or buildings to be used as a courthouse and jail, and may remodel, repair, maintain and equip such building in said place or places. * * *"

Section 49.305, V.A.M.S., provides in part as follows:

"The county court of any county may acquire by purchase, for the county, improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmary; or, when the county owns the site may acquire by purchase improved or unimproved real estate as an addition to or enlargement of the site* * *".

Section 49.510, V.A.M.S., provides as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county

may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Section 49.270, V.A.M.S., provides in part as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; * * *"

None of the foregoing statutory provisions, or other similar provisions in the statutes, contain any express authority to the county court to rent space for the sole use and benefit of county officials. Section 49.270, which grants authority to the county court to lease property, limits such authority to a lease which is made "for the use and benefit of the county", and in any event the authority so granted must come within the scope of the specific powers provided for in the other sections of the statute.

Absent express authority conferred by statute, there is no power to rent space to provide a parking area for county officials unless such power could be implied from the powers expressly granted. The law, as to implication of power, is stated in Everett v. County of Clinton, 282 S. W. 2d. 30, 1.c. 37 as follows:

"* * *If such power exists, it must be looked for among those powers which can be implied only as being essential to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the county by statute. If such a power exists, it must be one related to the subject with which the county has authority to deal in discharging a duty imposed by law. * * *(Emphasis ours).

This principle was stated in Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979, 1.c. 981 as follows:

"* * *Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the courts by statute or the performance of a duty specifically required

of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created.* * *

In the cases in which the county court was held to have implied power it clearly appeared that such power was essential to the proper exercise of the express power granted or was necessary to be inferred from the granting of such power. Thus, in Walker v. Linn County, 72 Mo. 650, it was held that the county court, which had the control and management of the county property and the power to alter, repair, or build county buildings, had the duty to take such measures as should be deemed necessary to preserve all buildings and property of the county and that duty carried with it the power to enter into a contract to insure the buildings.

In Ewing v. Vernon County, 216 Mo. 681, 116 S. W. 518, the court held that the county court was required to furnish necessary janitorial services for the office of the county recorder, such services being in the furtherance of the public interest. In Shiedley v. Lynch, 95 Mo. 487, 8 S. W. 434, the court held that the power to erect a courthouse included the power to buy land for a courthouse site. And in State ex rel. Wahl v. Speer, 284 Mo. 45, 233 S. W. 655, 1.c. 660, the court held that the statute which empowered a county to incur a debt to build a courthouse impliedly granted power to expend part of the money in the purchase of additional ground for a site, ground to enlarge the old site and render it suitable for the proposed building.

In all of the foregoing and numerous other cases the court makes clear that the power which is implied is within the scope of the express powers or essential for the purpose of carrying out such express powers. And in each instance, the interest of the county was served rather than the interest of a particular individual or individuals.

It is true that in modern society automobiles have become reasonably necessary in providing transportation. It is equally true that parking areas have become necessary for the proper functioning of the daily movement of the population in motor vehicles. In former days, hitching posts and rails were maintained on public highways in the interest of the public in attending to business at the county offices. Parking facilities have replaced such hitching posts and rails. Our statutes must be construed in the light of modern conditions and the society in which we live. However, it is not the function of the courts, and certainly not of this office, to attempt to amend the statutes in the guise of construction.

Honorable Stephan A. Strom

The question then, is whether it may reasonably be held to be for the "use and benefit of the county" in carrying out the powers expressly granted to the county court for the county court to provide parking areas for the exclusive benefit of county officials who choose to utilize their automobiles for the purpose of transporting themselves to their offices.

The duties of the county officials can be carried out efficiently whether or not such parking space is provided. The manner of transportation utilized by the official is in no way related to the proper functioning of his office or the performance of his duties. While it may be true that the official would not derive any substantial personal benefit from the parking space in any realistic view of the case, nevertheless there is some personal benefit, and no real benefit to the county as such.

If the county could be held to have the power to rent space for the sole purpose of providing such parking facilities, it should follow that the county could rent space in a private garage for the use of the official, or could provide funds for the purpose of paying parking meter charges incurred by such official. We do not believe that the county court has such power. If the county has the power to provide parking space on the theory that the officials are required to utilize automobiles to attend to their offices, it would reasonably follow that the county could provide motor vehicles to be utilized by the officials for such purpose. Again, we do not believe that the county has such power.

It is only where such automobile, or the use thereof, is reasonably necessary to the efficient performance of the duties of the particular officer rather than simply as a means of attending the place where the duties are to be performed, that the county could properly be held to have the power to provide parking space for such automobiles.

CONCLUSION

It is the opinion of this office that the county court of Cape Girardeau County has no power or authority to rent parking space for the use of county officials while attending to their duties at the county courthouse.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

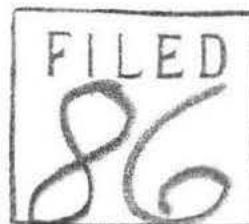
THOMAS F. EAGLETON
Attorney General

COUNTY COURT:
COUNTY SANITARIAN:

There is no power in a county of the third class to create the office of county sanitarian to inspect and enforce rules regarding eating establishments and milk production facilities. If there is a duly appointed county health officer, he may employ personnel to assist him in gathering information upon which he can act whether he designates such person as county sanitarian or by some other name.

July 19, 1961

Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Mr. Strom:

Your recent request for an official opinion reads:

"The County Court of Cape Girardeau County is of the opinion that it would be advantageous to have a system of health inspection within the county, including in particular an inspection of the milk producing facilities within the county. The county has no Health Unit. Upon request of the County Court, I have examined the statutes to determine whether or not it is possible to carry out such a procedure that the County Court desires, and I have been unable to find any particular authority for such a program, with the exception of the Missouri Dairy Law as enforced by the State Commissioner of Agriculture. Apparently, the Department of Agriculture has not inaugurated a system for making the inspections which are provided by the statute.

"The County Court has requested that I seek your opinion concerning whether or not it is permissible for the county to allocate funds for the payment of the salary of a 'county Sanitarian'. I have raised the question with the County Court concerning the basis for the duties of such a person and whether or not he would have any authority to enforce his recommendations or orders.

Honorable Stephen E. Strom

"In the past, the county has contributed funds for the payment of such a person, with the remainder of the fund being contributed partially by the City of Cape Girardeau (which has its own milk inspection law) and partially by some of the dairies themselves. The arrangement has come up for renewal and when my advice was sought concerning the matter, I attempted to check the statutes with reference to the same and can find no authority therefor. However, on the other hand, the county auditors have approved the county contribution in the past and the sanitarian had been in contact with various state health authorities with reference to his qualifications under the 'merit system', etc. Apparently there has never been an incident arise where the question of his authority has been involved.

"In short, the whole question resolves itself into what measures the County Court can take to see that the Missouri Dairy Law is enforced in the county and whether other sanitary requirements with reference to county eating establishments, etc., can be enforced, including the question of the allocation of funds for payment of salaries."

Several sections of the RSMo 1959 appear to be applicable to the problem here involved. Section 196.535 provides that the Commissioner of Agriculture shall administer the Missouri Dairy Law and provide for inspections of the dairy industry. Section 196.555 authorizes the commissioner to prescribe regulations to effectuate the enforcement of the laws relating to dairies. Section 71.720 is very closely related to the above two sections. It is the so-called "local option" provision permitting cities and towns, by ordinance, to license and regulate milk dairies and the sale of milk and provide for inspections. The above sections are complementary of each other and in actual practice have provided for a loosely wedded interlocking system of milk and dairy inspection in this state.

Section 192.020 charges the Division of Health of Missouri with the responsibility of safeguarding the health of the people of this state. Section 192.080 provides that, "all

Honorable Stephen E. Strom

powers and duties pertaining to food and drugs shall be exercised by the division of health." Section 196.190 requires sanitation in establishments handling food. Section 196.230 provides for abatement of violations by, "the director of the division of health and his assistants or agents by him appointed, the state, county, city and town health officers"

Section 205.010 sets out the method of establishing county health centers. Section 205.050 provides that the public health center is, "established, maintained and operated for the improvement of health of all inhabitants of said county or counties." Section 205.100 provides that the county court in February of each year shall "appoint the director of the public health center as county health officer and such county health officer shall exercise all of the rights and perform all of the duties pertaining to that office as set forward under the health laws of the state and rules and regulations of the division of health of the department of public health and welfare."

Your first question involves the authority of the county court to create the office or position of "county sanitarian" for the purpose of providing for inspection of milk producing facilities in Cape Girardeau County. As above indicated the state legislature has delegated the responsibility for enforcing the Missouri Dairy Law to the Commissioner of Agriculture and to local municipalities. The statutes do not authorize the county court of a third class county to promulgate regulations and administer the dairy laws of this state. When such a delegation of authority was desired, it was provided for by the legislature for counties of the first class, by Section 192.300, RSMo 1959.

Both in connection with the above question and the other question involved in this case, namely, whether the county court can hire a "county sanitarian" to provide for inspection of eating establishments, it is important to keep in mind that the county has not seen fit to organize a "county health center" or hire a qualified county health officer insofar as we have been able to ascertain. Chapters 205 and 192 specifically spell out the methods for adopting county health units and employing county health officers and states that such units are authorized for the purpose of "improvement of health of all inhabitants of said county" Here the legislature has spelled out methods of meeting local health problems on a local basis. Now we come to the question of whether the methods enumerated by the legislature are exclusive or whether the county court can go off on a tangent of its own. The Supreme Court of Missouri in the case of Kroger Grocery & Baking Co. v. City of St. Louis, 106 S.W. 2d 439, states:

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" . . . when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out."

We are of the opinion that where a county health officer is appointed under provisions of Section 192.260 or where, under the provisions of Section 205.100, the head of the county health center is ex officio county health officer, the county health officer has power to make the inspection of milk producing facilities and also of eating establishments. In the absence of existence of a county health officer, the county has no power to create the office of "county sanitarian" for the purpose of inspection of milk producing facilities and eating establishments. Where there is a county health officer, and he appoints someone whom he calls a county sanitarian to act for him, then the sanitarian is merely an employee of the health officer. Under this arrangement the sanitarian would gather facts and report them to the health officer and the health officer would take whatever action necessary to enforce the state statutes and regulations promulgated by the Department of Health.

CONCLUSION

Therefore it is our conclusion that there is no power in a county of the third class to create the office of county sanitarian to inspect and enforce rules regarding eating establishments and milk production facilities. If there is a duly appointed county health officer, he may employ personnel to assist him in gathering information upon which he can act whether he designates such person as county sanitarian or by some other name.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:gm

TAXATION:
LANDLORD AND TENANT:
MUNICIPAL CORPORATIONS:
INDUSTRIAL DEVELOPMENT:

Real property and improvements constructed thereon which are owned by a municipality and leased to a private corporation may not be assessed against the municipality for property taxes but the private lessee's interest therein is subject to taxation.

October 19, 1961



Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We are in receipt of your request for an opinion of this office, which request reads as follows:

"The Town Board of a Village in Cape Girardeau County has asked me to seek an opinion from your office with reference to the following question:

'Is real property and the buildings thereon subject to county and village taxes which is owned by the village and upon which is constructed a factory which is leased by the village to a commercial industry and operated by that industry for profit?'

"I have examined Section 137.100, Revised Statutes of Missouri 1959, and the cases interpreting the same and can find no determination previously made upon this point. This particular village, which is contemplating construction of such an industrial facility, would like to have such property exempt from taxes."

Inasmuch as you refer to the construction of an industrial facility by a municipality to be leased to a private concern, we assume that the village in question intends to proceed under authority of Sections 71.790 to 71.850, RSMo 1961 Supp., recently enacted by the 71st General Assembly. These sections set out a comprehensive scheme for the authorization and financing of industrial development projects to be constructed by municipalities.

Honorable Stephen E. Strom

No provision is made regarding the taxation of projects thus constructed, so the general laws of taxation must apply.

Municipally owned property is exempted from taxation by Section 6 of Article X of the Constitution of Missouri, which reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

In accordance with that section, the General Assembly has enacted Section 137.100, RSMo 1959, the relevant portions of which are as follows:

"The following subjects are exempt from taxation for state, county or local purposes:

* * * *

(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament."

The question thus presented is whether, in the light of the foregoing statutory and constitutional provisions, municipally owned property leased to a private corporation for use as a profit-making enterprise is taxable as against either the municipality or the private lessee. It is the opinion of this office, as elaborated herein, that the interest of the municipality in such property is exempt from property taxes but that the lessee's interest in the property is subject to taxation.

Honorable Stephen E. Strom

Turning first to the question of the tax liability of the municipality, the case of Grand River Drainage Dist. v. Reid, 341 Mo. 1246, 111 SW 2d 151, is illustrative of a situation involving the assessment of public lands leased for private use. The Drainage District held certain lands to protect its lien for drainage taxes and, being unable to sell the property, leased it to private individuals for farming. Taxes on the land were assessed against the Drainage District, the Collector of Revenue contending that the land was being held and used in a proprietary and not in a governmental and public capacity. The Supreme Court held the Drainage District to be a municipal corporation within the meaning of Section 6 of Article X of the Constitution of 1875 (substantially identical to Section 6 of Article X, Const. 1945, supra). The Court went on to declare the assessment void on the ground that the private use of the land did not affect its tax exempt status as the property of the Drainage District.

The point was more clearly stated in School District of Berkeley v. Evans, 363 Mo. 208, 250 SW 2d 499. In that case an airplane manufacturing and assembly plant owned by the City of St. Louis, and located on city-owned land in St. Louis County, was leased to a private aircraft corporation. Taxes on the plant were assessed against the City, which appealed. The Supreme Court held the property to be exempt under Section 6 of Article X of the Constitution, supra, and the assessment void. The Court said (l.c. 500):

"It will be noted that the section of the Constitution provides that all property of the state and other political subdivisions shall be exempt from taxation. The same section provides that property used exclusively for religious worship, schools, etc., may be exempted from taxation by general law. (Italics ours.) The test to be applied to property held by the state and its political subdivisions is ownership while the test as to other exemptions which may be granted by general law is whether the property is being used for the purposes enumerated. The rule applicable in such a situation is thus stated in 61 C. J. 420, Section 455:

* * * Where municipal ownership is made the sole test of the exemption, the purpose of the use is immaterial, especially where use is made a condition

Honorable Stephen E. Strom

in other exemption provisions in the constitution and omitted in the provision relating to municipal corporations, and even where the exemption statute further provides that "nothing herein contained shall be construed to exempt from taxation any part of a lot or building used for any private purpose or for profit," where the exemption itself is construed as having no reference to city property; * * * *.

"In the case of City of Yankton v. Madson, 70 S. D. 627. 20 N. W. 2d 371, the court reviewed this question. Note what the court said, 70 S. D. loc. cit. 631, 20 N.W. 2d loc. cit. 372: 'Several of the states have identical or similar constitutional provisions, and they are generally construed to require the exemption of property owned by municipal corporations irrespective of use.'"

From the foregoing it is clear that land and buildings owned by a village and leased to a private firm to be operated for profit may not be assessed against the village due to the exemption provided by Section 6 of Article X, Missouri Constitution, supra.

With regard to the tax liability of the private lessee in State ex rel. Benson v. Personnel Housing, Inc., Mo., 300 SW 2d 506, the Supreme Court considered the question of the taxation of the interest of a private corporation leasing property of the United States for use as a commercial enterprise. In that case, the defendant leased a number of housing units from the Federal government for a period of 75 years. The lessee's interest was assessed as realty. The Court first cited State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 SW 998, wherein it was held that the interest of a private individual leasing property from an exempt charitable institution could be taxed. The Supreme Court then went on to decide that the interest of a lessee of governmental property could similarly be taxed. Due to the fact that the lease period was for twice the estimated useful life of the buildings, the Court sustained the assessment at their full value, stating that the lessee would have the use and enjoyment of the full worth of the buildings. The full value aspect of the case would appear to be a question solely of the correctness of the amount of the assessment and not one of the taxability of the property. The Court also held the lessee's interest to be

Honorable Stephen E. Strom

properly classed as realty for purposes of assessment. The significance of the case for present purposes lies in the Court's affirmance of the principle of the separation of the interests in leased land for purposes of taxation where the property is owned by an exempt governmental unit, and leased to a private corporation for commercial use.

In view of the Supreme Court's ruling in the Personnel Housing case, it is the opinion of this office that the property of which you inquire would be taxable against the lessee to the extent of his interest therein. As previously stated, it is our opinion that the municipal owner of the property is exempt from taxation.

CONCLUSION

Real property and the improvements constructed thereon, which is all the property of a municipality and leased to a private concern for commercial use, is not taxable against the municipality. However, the lessee's interest in the leased premises is taxable.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James J. Murphy.

Yours very truly,

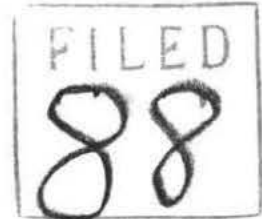
JJM:MW

THOMAS F. EAGLETON
Attorney General

CRIMINAL LAW:
PRIOR CONVICTIONS:
SELF-INCRIMINATION:
TRIAL:
CRIMINAL PROCEDURE:
CONSTITUTION:

Under procedure established by Section 556.280, RSMo 1959, a defendant cannot be forced by the prosecution to testify as to his own prior convictions. To do so would be in violation of the immunity from self-incrimination granted to said defendant under Article I, Section 19, Missouri Constitution of 1945. However, said immunity may be waived by defendant voluntarily testifying to said prior convictions.

March 22, 1961



Honorable Stewart E. Tatum
Prosecuting Attorney
Jasper County
Courthouse
Joplin, Missouri

Dear Mr. Tatum:

This is in reply to your letter of February 24, 1961, wherein you request an opinion from this office as follows:

"I wish to propose a set of facts under Section 556.280, 1949 V.A.M.S., as amended by S.B. #177, Laws of 1959.

"Defendant is charged with a felony in the Circuit Court, and under the Habitual Criminal Act, which alleges three prior crimes, etc., in accordance with the Habitual Criminal Allegation, these crimes being in other states.

"My question has to do with proof of these prior convictions under the Habitual Criminal Act. Assume the trial having been commenced and the state having produced it's evidence in chief on the crime being prosecuted, and is up to the point to where it proves the prior offenses, etc., to the judge under this new law. Further assume that there has not been time to get the records of the respective courts properly setting out the prior convictions, commitments, and discharges, or in the alternative, the question of identity of the defendant is substantial. What would be the prohibitions against calling the defendant himself to take the stand, at this stage, before the court only and out of the presence of the

Honorable Stewart E. Tatum

jury, for the sole purpose of interrogation on the prior offenses and establishing identity of this defendant as being one and the same person as the person convicted of the prior offenses? It appears to this writer that there is no question of guilt or innocence of the crime under prosecution being involved, and if this is so, it may follow that the defendant's constitutional privileges would not be violated by such procedure, as well as greatly expediting the state's proof of these prior offenses."

Section 556.280, V.A.M.S., as amended by S. B. #177, Laws of 1959, merely provided a new procedure under which a defendant could be tried under the "Habitual Criminal Act" and did not affect any of his substantive rights. This position was declared by the Supreme Court in State v. Morton, 338 S.W. 2d 858, loc. cit. 863:

"It was procedural in nature and did not create a new crime, increase the punishment for robbery, or come within the terms of any of the classifications specified in the definition heretofore quoted. The act provided that the trial judge, rather than the jury, would determine the punishment."

Although the amendment was procedural only, no one will argue that the attempt to prove a defendant's prior convictions when pleaded by the prosecution is an integral part of the trial, affecting his substantive rights.

Article I, Section 19 of Missouri Constitution, 1945, states:

"**That no person shall be compelled to testify against himself in a criminal cause ***."

Unquestionably, the courts of this state have consistently held that a defendant cannot be compelled to incriminate himself in regard to any of his substantive rights during a criminal trial.

This position was stated in State v. Simmons Hardware Co., 18 S. W. 1125, loc. cit. 1127:

"It has been said that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can

Honorable Stewart E. Tatum

be insured, and this position is abundantly sustained by authority."

This position was reaffirmed by the Court in State v. Topel, 322 S. W. 2d 160, loc. cit. 162:

"Missouri Courts have long held that the immunity from self-incrimination is available before any tribunal in any proceeding."

In this respect, the Court's position would seem to be that this Constitutional immunity from self-incrimination applies in all phases of criminal procedure from preliminary hearing to final trial, inclusive.

Furthermore, the Court has held that although this Constitutional immunity from self-incrimination may be waived by a defendant, his testifying alone is not conclusive proof of such a waiver. For the true test to be applied is that of voluntariness on the part of the defendant. As stated in State v. Burnett, 206 S. W. 2d. 345:

"In the case of State v. McDaniel, 336 Mo. 656, 80 S. W. 2d. 185, we ruled the testimony given by the accused at a coroner's inquest, if given voluntarily, could be used against him at his trial for the reason that he could waive his constitutional right to immunity. We also ruled that where a defendant was subpoenaed as a witness and appeared at a coroner's inquest and testified, that fact alone did not make his testimony inadmissible. The test as to the admissibility of this character of testimony is no longer whether it was made in a judicial proceeding under oath but: was it voluntary? If so, then it is admissible, otherwise not."

So sacred to jurists and so deeply ingrained in their thinking is this Constitutional immunity from self-incrimination, that they have declined to allow this right to be tampered with or ignored by the prosecution merely because said immunity is an inconvenient barrier to the prosecution of a defendant.

State v. Faulkner, 75 S.W. 116, loc. cit. 135:

Honorable Stewart E. Tatum

"In Missouri it forms one of the sections of our Bill of Rights and organic law. 'No person can be compelled to testify against himself in a criminal cause.' In every state of the Union a similar provision is found in its Constitution. It is firmly embodied in the Constitution of the United States. The Courts have jealously enforced it in all cases in which it was properly invoked. Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. loc. cit. 631, 6 Sup. Ct. 524, 29 L. Ed. 746, voiced the sentiments of all American Courts and lawyers when he said: 'Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.' In our own jurisprudence, from the first volume of our Reports down to the last, the same principle has been fearlessly announced and adhered to. It is not to be abandoned to subserve the exigencies of any particular prosecution."

It therefore follows that although the amendments by S. B. #177, Laws of 1959, to Section 556.280, V.A.M.S., are deemed merely procedural in scope and not in abrogation of any of a defendant's substantive rights, this factor does not serve as a justification for a prosecutor's violating a defendant's Constitutional immunity from self-incrimination pursuant to Article I, Section 19, Missouri Constitution, 1945, by causing a defendant to involuntarily testify as to his own prior convictions.

CONCLUSION

Under procedure established by Section 556.280, RSMo 1959, a defendant cannot be forced by the prosecution to testify as to his own prior convictions. To do so would be in violation of the immunity from self-incrimination granted to said defendant under Article I, Section 19, Missouri Constitution of 1945.

However, said immunity may be waived by defendant voluntarily testifying to said prior convictions.

Honorable Stewart E. Tatum

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD:vm

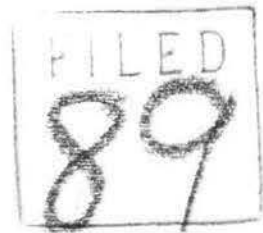
PROSECUTING ATTORNEYS:
COUNTY COURTS:
COUNTY HOSPITALS:
CIRCUIT COURTS:
MAGISTRATE COURTS:
COSTS:
COURT RULES:
FILING FEES:

(1) A prosecuting attorney may not compromise and settle an action for the collection of county hospital accounts on his own initiative but must have express approval of any such compromise settlement from the county court
(2) Circuit judges and judges of the magistrate court have authority to require the payment of court costs or a docket fee in advance at the time of filing suit and

counties would have to comply with such rule and pay whatever costs or docket fee are required by the rule when filing suit in such court with the exception of that part assessed as the library fee in circuit courts and that part assessed as the six dollar filing fee in magistrate courts. (3) A prosecuting attorney has no authority to forward delinquent county hospital accounts to an out of state attorney for collection. Any such arrangements must be made by the county court.

November 14, 1961

Honorable Francis Toohey, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri



Dear Mr. Toohey:

This is in answer to your letter of May 19, 1961, requesting an opinion of this office on the following questions:

- "1. May a delinquent hospital account which has been placed in the hands of the Prosecuting Attorney for collection and where the party thereto is living in a distant state be forwarded to an attorney in another state for collection.
2. May a county in Missouri in which a suit is filed by the Prosecuting attorney on delinquent hospital accounts insist that the court costs including sheriff fees be paid in advance before filing the case.
3. May the Prosecuting Attorney once such delinquent hospital accounts are placed in his hands compromise and settle said accounts upon his own judgment or must he have the consent of the entire hospital board before compromising the same."

The hospital accounts referred to in your opinion request are those of a county hospital. The questions propounded in the opinion request will be answered in reverse order.

In answering the question concerning the authority of the Prosecuting Attorney to compromise and settle the accounts of

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the county hospital, we first turn to the applicable statutes.

Section 56.060, RSMo 1959, provides in part:

"Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county. * * *"

Section 56.070, RSMo 1959, provided in part:

"The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. * * *"

In *State v. Hoeffner*, 28 S.W. 5, it was held that the Prosecuting Attorney could not compromise a forfeited recognizance and at loc. cit. 7 it is said:

" * * * The rule is well settled that, in the absence of express authority, an attorney has no power to compromise his client's suit, or to satisfy his judgment without receiving the amount thereof. * * *"

Accordingly, it is our opinion that the prosecuting attorney may not compromise and settle the county hospital accounts on his own initiative. Before any compromise settlement of the account can be made, express approval of the county court must be obtained.

In answer to your question concerning the payment of court costs in advance, we first consider the situation of a case filed in circuit court. We are unable to find a statute which specifically exempts a county from prepaying court costs or depositing a docket fee when suit is instituted originally in circuit court. Sections 514.010 and 514.020, RSMo 1959, concerning the giving of security for the payment of costs are not applicable to this problem of depositing costs or a docket fee at the time of commencement of the suit. It is a matter of common knowledge that circuit courts

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usually require the deposit of a docket fee at the time of filing of a suit. These docket fees vary in amount between different circuit courts. In the absence of a statute specifically authorizing such a docket fee it is presumed that the docket fee required in any particular circuit court is authorized by rule of the local circuit judge. Circuit judges are empowered to make such rules by Supreme Court Rule 50.01, which reads as follows:

"Courts of Appeals and trial courts may make rules governing the administration of judicial business if the rules are not contrary to the rules of the Supreme Court, to the Constitution or to statutory law in force."

There is no exemption for counties under the provisions of Supreme Court Rule 50.01. By Sections 514.440 and 514.470 counties are exempted from the payment of that part of a docket fee which is assessed as a library fee. With the exception of the library fee, the question of whether a county is required to pay court costs or a docket fee in advance at the time of filing suit would depend on the wording of the applicable rule of the local circuit judge. Unless exempted by the wording of the rule of the local circuit judge, counties would have to comply with such rule and pay whatever costs or docket fee are required by the rule, with the exception noted above of that part assessed as a library fee.

We next turn to the situation of a case filed in magistrate court and refer you to Section 483.615, RSMo 1959, which reads in part as follows:

"1. A fee of six dollars shall be allowed the magistrate in each civil proceeding, general or special, instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of six dollars.
* * *"

This statute specifically exempts a county from paying the six dollar filing fee in advance in magistrate court. The monetary

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limit of the jurisdiction of the magistrate court is \$1,000.00 in most counties (Section 482.090, RSMo 1959). As a practical matter this limit would accommodate the filing of the great majority of suits on delinquent hospital accounts.

In regard to the situation in a magistrate court where the magistrate judge has promulgated a rule governing the filing of suits in that particular magistrate court and by those rules requires the payment in advance of court costs or docket fees, we hold that the judge of the magistrate court has authority to make such a rule. There may be some question as to whether this authority is derived from Supreme Court Rule 50.01 quoted above in this opinion in view of Supreme Court Rule 41.02 which governs the applicability of the Supreme Court Rules of Civil Procedure and which states that "where specifically provided, the rule shall govern proceedings in magistrate courts", and we do not rule on this point. In any event Section 5 of Article V of the 1945 Constitution of Missouri, Supreme Court Rule 41.02 and Supreme Court Rule 50.01 do not prohibit a magistrate court from making rules to govern the practice in the magistrate court. A magistrate court is a court of record (Section 517.050 RSMo 1959). It is well established law that a court of record has authority to make rules governing the practice by them. In *Mackson v. Metropolitan Life Ins. Co.*, 115 S.W. 2d 217, 1.c. 218, it is said:

"That courts of record have authority to make rules governing the practice before them, when in harmony with the law, is beyond question. *Brooks v. Boswell*, 34 Mo. 474. The rule invoked in this case was within the power of the court to make, and was a reasonable regulation. When a rule of practice that is reasonable and proper is thus made, and is known to the bar, it is the duty of the court to enforce it. If the court should disregard its own rule, it would thereby suffer the rule to become misleading to those who follow it, and work injustice." *Rigdon v. Ferguson*, 172 Mo. 49, 72 S.W. 504, 505."

We therefore hold that the judge of a magistrate court may make a rule requiring the payment in advance of court costs or

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a docket fee before a case can be filed in magistrate court. Such a rule would generally be in conformity with law. However, a county would be exempt from the payment of that part of the court costs or docket fee which is assessed as the six dollar filing fee under Section 483.615 RSMo 1959, quoted above. With the exception of this six dollar filing fee, the question of whether a county is required to pay court costs or a docket fee in advance at the time of filing suit in magistrate court would depend on the wording of the applicable rule of the local magistrate court. Unless exempted by the wording of the rule of the local magistrate court, counties would have to comply with such rule and pay whatever costs or docket fee are required by the rule, with the exception noted above of that part assessed as the six dollar filing fee under Section 483.615 RSMo 1959.

Our opinion would therefore depend on the rule of the local circuit judge or local magistrate court.

Circuit judges and judges of the magistrate court have authority to require the payment of court costs or a docket fee in advance at the time of filing suit and counties would have to comply with such rule and pay whatever costs or docket fee are required by the rule when filing suit in such court with the exception of the library fee in circuit courts and the six dollar filing fee in magistrate courts.

We now turn to your question concerning forwarding accounts to an attorney in another state for collection. In order to obtain the services of an attorney in another state, such attorney would have to be paid. If the out of state attorney were employed at the expense of the prosecuting attorney, no question would be raised. If the out of state attorney were employed on a contingent fee basis, this would be equivalent to a compromise of the account since the county would not receive all of the money due on the account. We have previously said that the prosecuting attorney could not compromise or settle the account without express approval of the county court, and we likewise hold that a contingent fee arrangement with an out of state attorney cannot be made by the prosecuting attorney. Such an arrangement would have to be made, if at all, by the county court. If the out of state attorney were to be paid a stated fee for the collection of the account, such an arrangement for the payment of the attorney out of county funds would have to be made by the county court, and not by the prosecuting attorney.

Honorable Francis Toohy, Jr.

CONCLUSION

It is therefore the opinion of this office as follows:

1. A prosecuting attorney may not compromise and settle an action for the collection of county hospital accounts on his own initiative but must have express approval of any such compromise settlement from the county court.
2. Circuit judges and judges of the magistrate court have authority to require the payment of court costs or a docket fee in advance at the time of filing suit and counties would have to comply with such rule and pay whatever costs or docket fee are required by the rule when filing suit in such court with the exception of that part assessed as the library fee in circuit courts and that part assessed as the six dollar filing fee in magistrate courts.
3. A prosecuting attorney has no authority to forward delinquent county hospital accounts to an out of state attorney for collection. Any such arrangements must be made by the county court.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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WW:aa:mc

PHARMACY BOARD:
ADMINISTRATIVE AGENCIES:
REGULATIONS:

Board of Pharmacy may not pass a regulation prohibiting the truthful advertising of prescription drugs in pharmacies.

August 7, 1961



Mr. Lloyd W. Tracy, Secretary
Missouri Board of Pharmacy
Room 130
State Capitol Building
Jefferson City, Missouri

Dear Mr. Tracy:

This will acknowledge receipt of your request for an opinion which reads as follows:

"The Board of Pharmacy request an official opinion of whether it is within our power to promulgate a regulation like that as set out in the third paragraph of the resolution received today from the Kansas City Retail Druggists' Association, of which a copy is enclosed."

The resolution referred to in your letter and attached thereto provides:

"Whereas, it is the unanimous opinion of the Board of Directors that price advertising of legend drugs in any media is undesirable from the standpoint of eventually demoralizing prescription prices, contributing to public confusion and misconceptions concerning the availability of such drugs, and is therefore not in the public interest, and

"Whereas, it is the unanimous opinion of the Board of Directors that price advertising of legend drugs is not in keeping with the ethics of the profession of Pharmacy, therefore

"Be it Resolved that the Board of Pharmacy of the State of Missouri be requested, and hereby is, to issue and enforce regulations to the effect that 'no pharmacy, nor pharmacist shall advertise in any manner the name of any drug, medicine, or other item, which may not otherwise be dispensed except upon prescription issued by a duly

Mr. Lloyd Tracy

licensed practitioner. Provided; that nothing in this regulation shall prohibit the furnishing of professional information to qualified practitioners.' "

Also enclosed with your letter is a resolution of the Greater Kansas City Chapter of the American Pharmaceutical Association which contains further background data on this question and is set out below:

"Whereas, the advertising of legend drugs by any media of public communication is a practice in direct contradiction to the vitally important restrictions and safeguards dealing with drug traffic, and

"Whereas, such promiscuous advertising inevitably fosters and promotes the dangerous practice of self-medication with potentially hazardous drugs, and

"Whereas, the same irresponsible advertising necessarily inflicts an intimidation on the prescribing prerogatives of Physicians, and

"Whereas, it is a malicious violation of his professional obligations for any Pharmacist to contribute to public confusion and misconceptions concerning the availability and characteristics of potent drugs, therefore,

"Be it resolved, that the Greater Kansas City Chapter of the American Pharmaceutical Association in the public interest condemns the practice of advertising legend drugs, and denounces Pharmacists who thereby foresake their responsibilities to the public. Further, the Chapter calls upon the Missouri State Board of Pharmacy to issue regulations forbidding such advertising, and to vigorously and courageously enforce the same regulations, for the greater protection of the public we serve."

The resolution which embodies the suggested wording for the regulation denounces "price advertising" yet the regulation would prohibit any advertising of prescription drugs. However, as explained below, the conclusion herein would not be altered by

Mr. Lloyd W. Tracy

the inclusion of a prohibition against price advertising in the regulation.

At the outset, we should note that in Missouri an administrative agency has only those rule making powers as are given to it by statute. As was said in *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission* (Mo. App. 1949) 225 S.W. 2d 792, 794:

"... the adoption of such a rule by respondent can only be legally authorized upon the grounds that the Legislature has directly, or by necessary or reasonable implication, authorized the same. Respondent has no power except that granted by its creator."

The Missouri Board of Pharmacy has been authorized by statute to make rules and regulations directed at carrying out the duties with which the Board is charged.

Section 338.140 RSMo. 1959 provides in part:

"1. The board of pharmacy shall have a common seal, and shall have power to adopt such rules and bylaws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under sections 338.010 to 338.190, and shall have power to employ an attorney to conduct prosecutions or to assist in the conduct of prosecutions under sections 338.010 to 338.190."

The statutes cited in the above quoted section relate primarily to the legislative requirement of a license to practice pharmacy and the qualifications necessary to obtain such a license.

Under the heading "regulation of Pharmacies", the Board is similarly authorized to "make such rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of sections 338.210 to 338.300", Section 338.280, RSMo 1959. Those sections generally require the licensing of pharmacies, set the standards for issuance of such licenses by the Board, and provide the procedural steps for obtaining and renewing such licenses.

Mr. Lloyd W. Tracy

Section 338.240 provides as follows:

"Upon evidence satisfactory to the said Missouri board of pharmacy:

"(1) That the pharmacy for which a permit, or renewal thereof, is sought, will be conducted in full compliance with sections 338.210 to 338.300, with existing laws, and with the rules and regulations as established hereunder by said board;

"(2) That the equipment and facilities of such pharmacy are such that it can be operated in a manner not to endanger the public health or safety;

"(3) That such pharmacy is equipped with proper pharmaceutical and sanitary appliances and kept in a clean, sanitary and orderly manner;

"(4) That the management of said pharmacy is under the supervision of either a registered pharmacist, or an owner or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physician's prescriptions in the event any such prescriptions are compounded or sold;

"(5) That said pharmacy is operated in compliance with the rules and regulations legally prescribed with respect thereto by the Missouri board of pharmacy, a permit or renewal thereof shall be issued to such persons as the said board of pharmacy shall deem qualified to conduct such pharmacy."

Subsection (5), supra, as well as Sections 338.140 and 338.280, can be read to imply that the Board has the authority to regulate the operation of Missouri pharmacies. Such control, however, must be exercised in relation to the ultimate purpose of the Board, i.e., the protection of the health and welfare of the public in its dealings with pharmacists and pharmacies.

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Courts are quick to strike down rules of administrative agencies which have no direct relationship to the duties imposed on the agency by the legislature. A recent example of this is provided by *Portwood v. Falls City Brewing Co.* (Ky. 1958) 318 SW2d 535 wherein the Kentucky Alcoholic Beverage Control Board attempted to outlaw illuminated advertising signs in premises licensed for retail sales. In holding the regulation invalid for lack of such relationship, the Court said: "As a general rule administrative agencies are vested with a great deal of discretion in exercising their authority. However, there are standards and limits which must be observed. * * * A succinct statement of the rule is found in 42 Am. Jur. Public Administrative Law, Sec. 100, p. 430, where it is said: "'Rules and regulations must be reasonably adapted to secure the end in view, and are invalid if shown to bear no reasonable relation to the purposes for which they are authorized to be made.'" *Portwood v. Falls City Brewing Co.*, supra, 536.

Another case in point is *Medical Properties, Inc. v. North Dakota Board of Pharmacy* (N.D. Sup. 1956) 80 N.W.2d 87 which arose when the Board refused to issue a pharmacy license to a corporation. The refusal was grounded on the failure of the corporation to meet two regulatory prerequisites laid down by the Board: that a corporation, to hold a pharmacy license, must be owned and controlled by pharmacists, and that no pharmacy would be licensed unless it occupied 400 square feet of floor space with direct public access to the street.

The North Dakota Court held the regulation concerning the ownership of the corporation invalid because it amounted to an unauthorized limitation of the applicable statute which permitted the licensing of a corporation if it "is qualified to conduct the pharmacy." The 400 square feet requirement was held invalid because, l.c. 91, "Such a regulation is discriminatory and has no reasonable relationship to public health and safety."

With relation to the direct access to the street requirement, the Court said that it was "on its face unreasonable. Certainly if the pharmacy is in other respects a proper place for dispensing drugs, the fact that its entrance is from an arcade, a hotel lobby or a corridor in a railroad station does not in any respect affect its character as a proper place to sell drugs or prescriptions. The regulation is therefore invalid." Id. 91.

The above cases clearly require a reasonable relationship between that portion of the police power delegated to the administrative body and the objective of the regulation. However, it is difficult to understand how the public welfare can be prejudiced by the dissemination of truthful information concerning the name, nature, and price of drugs which can be

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purchased only upon proper prescription.

An administrative regulation directed at keeping the public ignorant of some truth, whatever it may be, is always difficult to justify. Nevertheless, experience tells us that for valid reasons such as national security, prevention of riots or public panic, this may be done. The reasons given for the proposed regulation are:

1. The "demoralizing" of prescription prices.
2. The possibility of "public confusion and misconception concerning the availability of such drugs."
3. The danger of self-medication.
4. "Intimidation on the prescribing prerogatives of physicians."

If, by the "demoralizing" of prescription prices, the agencies suggesting the regulation mean the "lowering" of prescription prices, let us say only that this type of control is not within the scope of the Board's duties or powers. The argument that such advertising will confuse the public and foster misconceptions as to the availability of the drugs not only is a contingency inherent in any advertising, but seems to contradict the other reasons given on behalf of the proposed regulation. If the advertised drugs are not available, no damage can be done and there is no danger to be avoided.

Another contradiction is presented by the third argument in favor of the regulation. By the terms of the regulation, it is addressed to drugs available only by prescription. Inasmuch as "self medication" imports purchase and use without prescription, this reason fails to provide any basis for action by the Board.

The contention that physicians will be intimidated by the advertising, or by patients who have seen the advertising, is likewise rejected. Aside from the fact that the professional skill and integrity of Missouri physicians is more than enough protection against the feared mesmerization of those who behold the advertising, it is not the function of the Board to control the sources of information of physicians or the general public.

Without further analyzing the arguments propounded on behalf of the regulation, let it be said that there is no threat to the health or safety of the community which would

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warrant a regulation of the type proposed. On the contrary, the suggested regulation would encroach upon the valuable right of merchants to proclaim their wares in a truthful manner and that of the public to be informed. Curtailment of these rights by the State is justified only by substantial and compelling reasons. None exists here.

CONCLUSION

It is the opinion of this office that the Missouri Board of Pharmacy may not by regulation prohibit the truthful advertising of prescription drugs in pharmacies.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:gm

COUNTY OFFICERS:
TOWNSHIP OFFICERS:
SOCIAL SECURITY:

Township collectors and their deputies, if any, are not subject to the provisions of House Bill 635 (71st General Assembly). Such collectors are not county officers within the meaning of the amendatory provisions of such bill, and therefore their deputies, if any, are not included in the extension of social security coverage provided for in such bill to employees of county officers compensated wholly by fees derived from sources other than county or state moneys.

October 27, 1961

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol Building
Jefferson City, Missouri



Dear Mr. Trigg:

You have requested an opinion from this office as follows:

"In view of the provisions of House Bill 635, passed by the 71st General Assembly, and other applicable statutes relative to OASI coverage, we would appreciate an opinion from your office answering the following questions:

1. Since, to our knowledge, there is no statutory authority for township collectors to employ deputies, are the wages or fees paid such persons subject to social security taxes under the provisions of Sections 105.300 and 105.365 RSMo 1959, as amended by House Bill 635, which becomes a law October 13, 1961?
2. Does the passage of House Bill 635 in any way change the official opinion of May 5, 1953, regarding persons selling license plates, titles, etc?
3. Does the passage of House Bill 635 in any way change the official opinion dated July 21, 1951, regarding members of the State Board of Law Examiners, the Executive Director of the Missouri Bar and the General Chairman of the Advisory Committee of the Missouri Bar?"

Honorable Charles D. Trigg

House Bill 635, effective October 13, 1961, by amending the definition of "employee" extends social security coverage to "county officers remunerated wholly by fees from sources other than county funds." Said bill enacts a new Section 107.365, whereby it is further provided as follows:

"Any county officer who is compensated wholly by fees derived from sources other than county or state moneys shall pay into the county treasury out of fees received by him amounts equal to the contributions required to be paid by the county under section 105.370 and shall collect from all deputies, assistants and employees in his office and turn over to the officer or agent of the county charged with the payment thereof to the state agency the amounts required to be collected and paid under section 105.370."

Your first question relates to whether wages or fees paid to deputies of township collectors are subject to social security taxes under the provisions of House Bill 635. You note the fact that there is no statutory authority for township collectors to employ deputies.

Your question appears to assume that if there were statutory authority for township collectors to employ deputies the wages of such deputies or the fees paid such persons would be subject to the provisions of the new law. However, a careful study of the statute leads to the conclusion that neither township collectors nor their deputies, even if the law authorized the employment of any deputy, come within the language of the amended law.

The new law applies to "county officers". This raises the question of whether township officers may be considered county officers within the meaning of the law. In our opinion, a township officer is not a county officer and therefore in no event would the provisions of the new law be applicable to any township officer even if he otherwise met the requirements of that law.

It is true that there is no all-inclusive definition which can be given to the words "county officer". In State v. Carter, Mo. Sup., 319 S.W. 2d 596, the Supreme Court, en banc, pointed out that there is no comprehensive definition of the words "county office". The legislative intent should govern, but such intent should be ascertained from the words used if possible. In this connection the court held, 319 S.W. 2d. 1.c. 600:

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"* * * In determining the intent and meaning of the words, county office, as used in this statute, the words must be considered in their context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words. * * *"

In that case it was held that a member of a county central party committee was not a county officer within the meaning of the corrupt practices act. The opinion cites a number of cases involving various offices which were held not to be county offices. Among such cases are the following: State ex rel Buchanan County v. Imel, 242 Mo. 293, 146 S. W. 783, holding that a probate judge is not a county officer within the meaning of a constitutional provision authorizing the general assembly to regulate the fees of a county officer; State ex rel Asotsky v. Hicks, 346 Mo. 640, 142 S.W. 2d 472, holding that justices of the peace were not county officers within the meaning of the statute providing for the filling of vacancies by appointment of the governor; and State ex rel Dodd v. Dye, Mo. App., 163 S. W. 2d 1055, holding that judges of the county court elected from districts were not county officers within the meaning of the statute providing for filing fees of county officers.

In Harrison and Mercer County Drainage District v. Trail Creek Township, Mo., 297 S.W. 1, the court held that it had jurisdiction over the appeal in that case because the defendant Trail Creek Township was a subdivision of the state. In the opinion the court stated, 1.c. 4:

"The township organization law provides for a distinct and separate government of the township, as a unit of government, in those counties of the state voting to adopt the township organization plan. It provides for the election of certain township officers and prescribes their governmental duties, powers, and authority. It provides for the assessment, levy, and collection of the revenue in such organized townships, not only to defray the usual and ordinary township governmental charges and expenses, but also for road and bridge uses and purposes. In other words, the general township organization law, and the constitutional authority under which such general law was enacted, in our judgment and opinion, contemplates and provides for the creation of a separate and distinct unit

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of government, known as an organized township, having certain governmental powers and charged with certain governmental obligations and duties, similar to those of a county."

It is to be noted that the constitutional provision which conferred jurisdiction on the Supreme Court related to cases where a county or other political subdivision of the state is a party, and the court concluded that the party, although not a county, was in fact a unit of government, that is, a political subdivision, "separate and distinct from the county." In State ex rel Wamack and Welborn v. Affolder, Mo. App., 257 S.W. 493, it was held that the prosecuting attorney had no duty to represent or act for a township although it was the duty of the prosecuting attorney to act for the county.

Section 105.300, RSMo 1959, containing definitions used in the statute involved in this question, defines in paragraph 8 a "political subdivision" as "any county, township, municipal corporation, school district, or other governmental entity of equivalent rank." It thus appears quite clearly that the legislature intended to differentiate between counties and townships. When amending the definition of "employee" in the new act, reference was made only to county officers as separate and distinct from township officers or officers of any other political subdivisions. While it is true that township collectors collect taxes for the county and state as well as the township itself (and also must account to the county court, Section 139.420), such fact does not make the collector a county officer any more than it makes him an officer of the school district by reason of collecting school taxes. In our opinion, the words "county officer" as used in the new statute were not intended to and do not include township officers.

The new law does not extend coverage to all county officers compensated by fees nor to their deputies and employees. The extension of coverage is carefully limited to those county officers who are compensated "wholly by fees derived from sources other than county or state moneys". Thus, to come under the act the compensation of the county officer must be derived wholly by fees, and the fees themselves must be derived from sources other than county or state moneys. In our opinion, township collectors are compensated by fees which are derived from county or state moneys, at least in part. They are required to collect taxes and their compensation is a commission, based on a percentage of such amount so collected by them. The taxes collected constitute the county or state moneys as and when collected. The fees or commissions are a portion of such moneys and are payable out of the taxes collected. Note Section 139.430 RSMo 1959 and Section

Honorable Charles D. Trigg

139.320 RSMo 1959 which authorize the collector to deduct his commissions from the taxes collected, and see Section 139.440, RSMo 1959, providing that a township collector who fails in performing certain duties "shall forfeit his commission on all moneys collected". Hence, in any view of the case township collectors would not come within the scope of the new statute.

It would appear that the new law is very limited in scope, inasmuch as there are very few county officers who may be held to be compensated wholly by fees derived from sources other than county or state moneys. One such officer who would fit the description in the new law would be public administrators, who are compensated wholly by fees derived from the estates they administer. County surveyors would also appear to come within the scope of the new statute. In any event, township collectors are not county officers within the meaning of House Bill 635, nor are they compensated wholly by fees derived from sources other than county or state moneys. Hence, neither said collectors nor their deputies, if any, are covered by the provisions of the new statute.

Your second question is whether the passage of House Bill 635 in any way changes the official opinion of May 5, 1953, regarding persons selling license plates, titles, etc. The opinion of May 5, 1953, was to the effect that persons selling such licenses are not covered. The new law has no effect whatsoever upon that opinion. Such persons are agents of the State Department of Revenue. Inasmuch as persons selling such license plates and titles are not county officers, they would not come within the scope or intent of the new statute.

The third question inquires whether House Bill 635 in any way changes the official opinion dated July 21, 1951, regarding the members of the State Board of Law Examiners, the Executive Director of the Missouri Bar and the General Chairman of the Advisory Committee of the Missouri Bar. Inasmuch as none of the persons mentioned in said opinion may be deemed or held to be county officers, it is our opinion that the passage of House Bill 635 in no way affects or changes the opinion of July 21, 1951.

CONCLUSION

It is the opinion of this office that neither township collectors nor their deputies, if any, are subject to the provisions of said House Bill 635. It is the further opinion

Honorable Charles D. Trigg

of this office that the passage of House Bill 635 in no way changes the official opinions of May 5, 1953, and July 21, 1951, concerning the status of persons selling license plates and titles as agents of the State Department of Revenue, members of the State Board of Law Examiners, the Executive Director of the Missouri Bar and the General Chairman of the Advisory Committee of the Missouri Bar.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

OPINION NO. 452 ANSWERED BY LETTER

November 28, 1961



Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested advice of this office concerning the validity of a certification of expenditures from the contingent fund of the House of Representatives which is attested by the assistant chief clerk acting in the absence of the chief clerk.

Section 21.220, RSMo 1959, provides that each house shall control its contingent expenses. It further provides that when any accounts properly chargeable to the House of Representatives are adjusted and allowed according to the rules of the House, a certificate shall be granted, signed by the speaker and attested by the chief clerk. The statute is silent as to the effect of such certificate. It is reasonable to assume, however, that upon the presentation of such a certificate to the comptroller, it serves as the equivalent of a claim or demand against the state chargeable to the contingent fund of the House, and that the comptroller may rely upon such certification. There is no provision in the statute which mandatorily requires the comptroller to issue a warrant for the amount set forth in the certificate upon its presentation. In our opinion, the certificate is for the purpose of furnishing prima facie evidence to the comptroller that the account in question is properly chargeable to the contingent fund and has been adjusted and allowed according to the rules of the House. Attention is called to the provisions of Section 33.140, RSMo 1959, which grants broad powers to the comptroller to examine into the correctness of any account.

Honorable Charles D. Trigg

Bearing in mind the purpose of the certificate, we do not believe that the statute would operate to invalidate every certificate which has not been attested by the chief clerk. If such construction were to obtain, it would mean that in the event of the death or incapacity of the chief clerk or his absence on an extended trip or if he were otherwise unavailable or unwilling to serve at any particular time, no claim properly chargeable to the contingent fund could be paid. It is unreasonable to assume that the Legislature intended any such result.

The rules of the House of Representatives provide for an assistant chief clerk. Under Rule 28, he is authorized to discharge the duties of the chief clerk in his absence. The word "absence" is not qualified in any manner, and in our opinion such word, as used in this connection, is synonymous with "nonpresence", whatever the cause of such nonpresence may be.

The words "chief clerk" as used in this statute are to be construed as referring to the person who at the time has the authority to perform the functions ordinarily performed by the chief clerk. It is our opinion, therefore, that a certificate, otherwise meeting the requirements of the statute, which is attested by the assistant chief clerk in the absence of the chief clerk is valid and that the comptroller may rely upon such a certificate in approving for payment expenditures so certified.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:BJ

December 7, 1961



Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested our advice with respect to the effect of the 1960 census upon the liability of the State for compensation of probate judges ex officio magistrates in Newton, Pulaski and St. Charles Counties. In each of such counties the population was less than 30,000 before the effective date of the 1960 census but now exceeds 30,000 in each of them. This office has heretofore ruled under date of February 14, 1961, in an opinion to Honorable John M. Rice that such decrease in population does not operate to create a vacancy in the office of magistrate during the term of the present probate judge ex officio magistrate, and that the incumbent judge would continue to fill the office of magistrate until the end of his term. This office has further ruled in an opinion dated January 26, 1961, to the Comptroller and Budget Director that where the application of the statutory formula so requires, magistrates salaries must be changed as of January 1, 1961, in accordance with the statutory classification contained in the laws in effect at the commencement of their terms, irrespective of whether such change results in an increase or a decrease in the amount of compensation payable.

In view of the foregoing and upon a review of the applicable statutory provisions, it is the opinion of this office that the judges who hold the office of magistrate in the above listed counties must continue to be paid by the State based on the classification set forth in Section 482.150, RSMo 1959, with their salaries changed in accordance with the new classification thereof resulting from the change in population.

Honorable Charles D. Trigg

It follows from the foregoing, that as of January 1, 1961, the State is liable for salaries of the incumbent probate judge ex officio magistrate in each of said counties on the following basis:

(a) In Newton County the salary of the judge is payable under the provisions of paragraph (5) of Section 482.150 instead of paragraph (4) of said section which was formerly applicable when the population was less than 30,000.

(b) In Pulaski County the salary of the judge is payable under the provisions of paragraph (6) of Section 482.150 instead of paragraph (1) which was formerly applicable.

(c) In St. Charles County the salary of the judge is payable under the provisions of paragraph (6) Section 482.150 rather than the provisions of paragraph (4) of said section which was formerly applicable.

As of October 13, 1961, the salary rate in each of the foregoing classifications has been increased. However, the classification itself is not thereby affected.

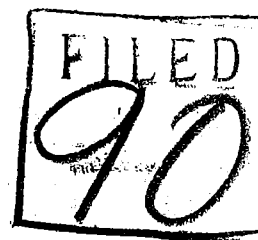
Yours truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

Opinion No. 401, Answered by Letter
(There is another letter pertaining to this
opinion request)

December 7, 1961



Honorable Charles D. Trigg
Comptroller and Budget Director
Jefferson City
Missouri

Dear Mr. Trigg:

You have requested the advice of this office with respect to the basis upon which the salary of the incumbent magistrate of Stoddard County is now to be determined, together with the effective date of any changes in such salary.

Section 23, Article V of the Constitution provides that judges of magistrate courts shall be selected for terms of four years. Section 482.010, RSMo 1959, specifically provides that magistrates shall hold their offices for a period of four years. Section 12, Article VII of the Constitution provides that except as otherwise provided in the Constitution, all officers shall hold office for the term thereof.

We find no provision in the Constitution which provides that the term of a magistrate shall automatically cease in the event of a decrease in the population in the county in which he was elected. Section 18, Article V of the Constitution which provides that in counties of 30,000 or less, the probate judge shall be judge of the magistrate court, does not operate to abolish the office held by the incumbent magistrate, even if it is also true that the incumbent probate judge is now an ex officio magistrate. In our opinion the incumbent magistrate is entitled to hold his office for the full term for which he was elected and to be compensated according to the statutory classification applicable to his county.

The only statutory provision for payment of salaries to magistrates is Section 482.150, RSMo 1959. Prior to the effective date of the 1960 census the magistrate of Stoddard County was paid

Honorable Charles D. Trigg

under the provisions of paragraph 1(5) of said section, which is applicable to counties having a population of more than 30,000 inhabitants but not more than 40,000 inhabitants. As of the effective date of the 1960 census the population of Stoddard County no longer exceeds 30,000 inhabitants but is now 29,490. The assessed valuation of Stoddard County within the meaning of Section 482.150, RSMo 1959, is \$33,779,371. The only provision for payment of salaries to magistrates in counties of the classification in which Stoddard County now falls is contained in paragraph 1(4) which by its terms applies to all counties "now or hereafter" having a population of more than 15,000 but not more than 30,000 inhabitants with an assessed valuation of more than \$26,000,000. In the opinion of this office dated January 26, 1961, to the Comptroller and Budget Director we ruled that incumbent magistrates salaries must be increased or decreased as of January 1, 1961, the effective date of the 1960 census if the application of the statutory classification in effect at the commencement of their terms so results. Accordingly the salary rate of incumbent magistrate of Stoddard County as of January 1, 1961, became \$7200.00. Effective as of October 13, 1961, the effective date of House Bill No. 281, the salary rate of magistrates in the classification in which Stoddard County now falls has been increased to \$8400.

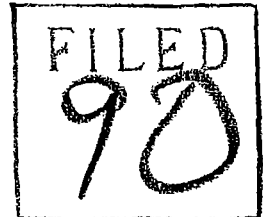
Yours truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

Opinion # 402, Answered by letter
(Joseph Nessenfeld)

December 7, 1961



Honorable Charles D. Trigg
Comptroller and Budget Director
Jefferson City
Missouri

Dear Mr. Trigg:

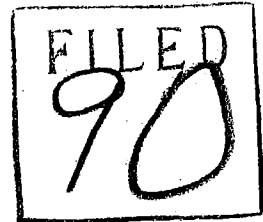
You have requested the advice of this office concerning the effect of Senate Bill 177 and House Bill 462 with respect to the amount to be paid as salary for the chief clerk of the magistrate court of Greene County and the total amount that may be paid by the state for salaries of clerk, deputies and employees of that county.

The chief clerk of Greene County is an official elected for a definite term of four years. In that respect his tenure differs from that of all other clerks of magistrate courts of this state. Inasmuch as the chief clerk of the magistrate court of Greene County has a definite term of office, no increase in compensation can be effective as to such officer during the term for which he was elected under the provisions of Section 13, Article VII of the Constitution.

It follows that Senate Bill No. 177, increasing the salary of the chief clerk, will not be effective until the commencement of the term of the chief clerk to be elected at the next general election. House Bill No. 462, increasing the total the State is authorized to pay for hire in the magistrate court to the sum of \$6,000 for each magistrate is effective October 13, 1961. As held in the opinion of this office to Honorable Newton Atterbury, dated March 1, 1955, the salaries payable to the chief clerk and deputy clerks constitute part of such total.

Yours truly,

THOMAS F. EAGLETON
Attorney General



December 7, 1961

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested the advice of this office concerning the total amount that may be paid by the State for salaries of clerks, deputies and employees of magistrate courts in Stoddard, Newton, Pulaski and St. Charles counties in view of the changes in population in said counties under the 1960 census, and House Bill No. 462. Newton, Pulaski and St. Charles counties each had a population of less than 30,000 under the 1950 census but their population now exceeds that figure. The population of Stoddard County has decreased so that it is now less than 30,000.

In our opinion dated January 26, 1961, to Honorable John W. Schwada, Comptroller and Budget Director, we held that where the application of the statutory formula so requires, incumbent magistrates' salaries must be changed as of January 1, 1961, in accordance with the statutory classification contained in the laws in effect at the commencement of their terms. We find no authority in any statute for the Comptroller to act upon the false assumption that the 1950 census is still effective in any of the above listed counties. In our opinion the 1960 census became effective as to all counties in the State for the same purpose. Liability of the State for clerical hire in magistrate courts is created by statute and no salaries may be paid by the state except as provided. The Comptroller has no authority to interpolate anything into the statute contrary to the express provision thereof, simply in order to avoid a result which the Legislature conceivably may not have contemplated. Section 483.490, RSMo 1959, prior to October 13, 1961 and the amendment thereof by House Bill 462, effective October 13, 1961, is the only statute under which the State is liable for clerical hire in any of the magistrate courts. It follows that upon the effective date of the 1960 census the State is authorized to pay for clerical hire only that amount which is provided for on the basis of the

Honorable Charles D. Trigg

present population.

Section 1.100, RSMo 1959, provides that for the purpose of ascertaining the salary of any county officer for any year or for any amount he is allowed to pay for deputies and assistants the effective date of the 1960 census is January 1, 1961. It follows, therefore, that in determining the total amount which may be paid by the state upon requisition of the magistrates of the respective counties for clerks, deputies and employees in magistrate courts the effective date of the 1960 census is January 1, 1961.

Applying the foregoing conclusion to the counties involved in your request, the following is the result:

As of January 1, 1961, Newton County had a population in excess of 30,000 and less than 40,000 inhabitants. The rate applicable to counties of that classification was set forth in paragraph 7 of Section 483.490, RSMo 1959, at \$2820.00 per annum. Effective October 13, 1961, under the provisions of House Bill 462 the rate applicable to counties of the size of Newton is now \$3420.00.

As of January 1, 1961, Pulaski County had a population in excess of 40,000 and less than 70,000 inhabitants. The rate applicable to counties of that classification was set forth in paragraph 8 of Section 483.490, RSMo 1959, at \$3220.00 per annum. Effective October 13, 1961, under the provisions of House Bill 462 the rate applicable to counties of the size of the size of Pulaski is now \$3820.00.

As of January 1, 1961, St. Charles County had a population in excess of 40,000 and less than 70,000 inhabitants. The rate applicable to counties of that classification was set forth in paragraph 8 of Section 483.490, RSMo 1959, at \$3220.00 per annum. Effective October 13, 1961, the rate applicable to St. Charles County is now \$3820.00.

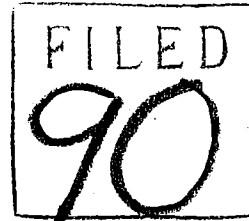
As of January 1, 1961, Stoddard County had a population in excess of 15,000 but not more than 30,000 inhabitants and with an assessed valuation of more than \$24,000,000.00. The rate applicable to counties of that classification was set forth in paragraph 6 of Section 483.490, RSMo 1959, at \$3800.00 per annum. Effective October 13, 1961, under the provisions of House Bill 462 the rate applicable to counties the size of Stoddard is now \$4400.00.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

December 7, 1961



Mr. Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

This refers to your letter of October 19, 1961, and subsequent consultations by representatives of our offices, with respect to the microfilming of state records.

In your letter, you ask whether Section 109.130, RSMo 1959, applies to all state agencies. Sections 109.120, 109.130, and 109.140, RSMo 1959, were enacted at the same time and must be considered together.

Section 109.120 provides in part that "the head of any state * * * department, commission, bureau or board may cause any or all records kept by such official, department, commission, bureau, board * * * to be photographed, microphotographed, photostated or reproduced on film."

Section 109.130 provides in part as follows:

"Such photostatic copy, photograph, microphotograph or photographic film of the original records shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies."

In view of the broad language of Section 109.120 and the fact that Section 109.130 refers to copies made pursuant to Section 109.120, it appears to us that there could be no serious doubt about Section 109.130 being applicable to all state agencies.

You also inquire whether, under Section 109.130, it is permissible to substitute microfilm records for original records and to destroy the original records even though there are statutes requiring the retention of the original records for specific periods of time.

Provision for the destruction of records which have been microfilmed is made by Section 109.140, which reads as follows:

"Whenever such photostatic copies, photographs, microphotographs or reproductions on films shall be placed in conveniently accessible files and provisions made for preserving, examining and using same, the said head of a state department, commission, bureau or board, county office or department, city office or department may certify those facts to the governor, or to the county court or to the mayor of a municipality, respectively, according to their status as subdivisions of government, who shall have the power to authorize the disposal, archival storage or destruction of the records or papers from which such photographic copies were made."

This section obviously is intended to authorize the destruction of records which otherwise would be legally required to be retained. In this connection we enclose a copy of an opinion furnished by this office to Warren E. Hearnese on April 21, 1961, relating to the destruction of certain records in the office of the Secretary of State.

It does not necessarily follow, however, that Sections 109.130 and 109.140 authorize the destruction of original records where there are specific statutes expressly requiring that the "original" records be retained for a stated period of time. Insofar as Section 109.130 has any bearing on this matter, it should be noted that that section merely provides that a copy made pursuant thereto shall be deemed to be "an" original record.

We do not believe that we should undertake to answer

Mr. Charles D. Trigg

3

your question with respect to the destruction of records where there are such specific statutes except after consideration of the particular statutes; and it is not our understanding that you desire us to undertake to do that at this time. In this connection, we may note that it appears to us that in at least some instances where there are such specific statutory provisions it would be undesirable, as a practical matter, to destroy the original records before the expiration of the stated periods of time, so that the question as to the legal authority to do so need not be answered.

We shall be glad to discuss with you at any time any further questions which you may have with respect to this subject.

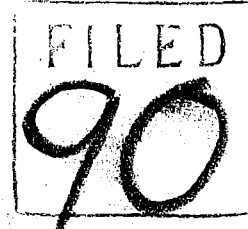
Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

1 enclosure

December 12, 1961



Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

We are in receipt of your recent request for advice as to whether the secretary-treasurer of the State Poultry Board may receive the additional compensation authorized by Senate Bill 85 of the 71st General Assembly during his current term of office.

As indicated in your letter, the principal issue to be resolved is whether the secretary-treasurer is a state officer and therefore prohibited from enjoying an increase of compensation during his current term.

The ingredients of state officer status were thoroughly analyzed in a prior opinion of this office issued at the request of Dr. Reuben R. Rhoades under date of July 5, 1961, a copy of which is forwarded herewith. A review of that opinion, as well as the statutes which create the position of secretary-treasurer of the Poultry Board and set out the duties of the person who fills that post, leads us to the conclusion that the secretary-treasurer is an employee of the board who does not share in the status of state officer. Consequently, the secretary-treasurer is not prohibited by Section 13, Article VII, Constitution of 1945 from receiving the increased compensation authorized by Senate Bill 85, 71st General Assembly, now codified as Section 262.140.

Briefly stated, our reasons for this conclusion are that a state officer, as defined in the above cited opinion of the Attorney General, is one who enjoys "independence in the exercise of some part of the sovereign power," whereas the statutes concerning the secretary-treasurer of the Poultry Board clearly display legislative intent that the secretary-treasurer may not

Honorable Charles D. Trigg

act independently but is, in all substantial respects, subservient to the directions of the Board. Section 262.140 specifically provides that the secretary-treasurer is not a member of the Board but is "employed" by the Board. That section denominates him "director of the state poultry experiment station" and states that he "shall conduct experiments in the interest of the farmers and poultry raisers of this state, and exercise the powers and discharge the duties prescribed for him by the board." (Emphasis added.) Under the terms of Section 262.200, RSMo 1959, the Board is charged with the duty of conducting and maintaining the experiment station of which the secretary-treasurer is director, thus even that function would be exercised under the supervision and direction of the Board.

On the basis of the foregoing, we advise that the secretary-treasurer of the State Poultry Board may receive the additional compensation provided for that position by the recent session of the General Assembly without violating Section 13, Article VII, Constitution of 1945.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:aa

Enclosure

PHARMACY BOARD:
STATUTES:

Repeal of statute authorizing Pharmacy Board to give examination to and to license persons who met the standards set out in said statute left the Board without authority to give such an examination or issue licenses pursuant thereto three days after the repeal became effective.

December 22, 1961

FILED
90

Mr. Lloyd W. Tracy, Secretary
Board of Pharmacy
Room 130
State Capitol Building
Jefferson City, Missouri

Dear Mr. Tracy:

This is in response to your recent request for an opinion of this office which request reads as follows:

"The State Board of Pharmacy request an official opinion of your office on the following questions:

(1) May the Board properly issue licenses to persons who took and passed an examination under the provisions of Section 338.045, RSMo. 1959. The examination was given on October 16, 1961, and Section 338.045 was repealed by the last session of the Missouri legislature. All applications of those who took this examination had been received by the Board prior to October 13, 1961.

(2) May persons who were qualified to take the examination under Section 338.045, RSMo 1959 and whose applications were received prior to October 13, 1961, take the examination in the future. These persons fall into two categories: those who applied to take an examination prior to October 13, 1961, and did not take the examination on that day; and those who applied prior to October 13, 1961, took, and failed the October 16 examination."

Mr. Lloyd W. Tracy, Secretary

Section 338.045, RSMo 1959, provided as follows:

"Any person who is at least fifty-one years of age and who has resided in this state for at least thirty years before the effective date of this section shall, on compliance with this section, be given an examination by the board of pharmacy upon presentation of evidence establishing that he has been engaged in the management of a drug store or pharmacy and in the compounding of prescriptions for at least thirty years and upon successful completion of such examination such person shall be granted a license. Application for such examination shall be made on forms prescribed by the board and shall be accompanied by the fee required by section 338.070. Any person so licensed shall be entitled to all the rights and subject to all the duties prescribed by sections 338.010 to 338.190 for applicants qualifying under sections 338.020 and 338.030."

House Bill 342, passed by the Seventy-first General Assembly reads:

"Section 338.045, RSMo 1959, is repealed."

We take notice of the fact that all legislation enacted by the Seventy-first General Assembly, except that containing an emergency clause, became effective on October 13, 1961.

The unlicensed practice of pharmacy in Missouri is declared unlawful by Section 338.010 and denominated a misdemeanor by Section 338.190, RSMo 1959.

In view of the intimate relationship between the practice of pharmacy and the health and welfare of the community, there can be little doubt that the state has the authority, in the exercise of its police power, to establish standards to be met by those who would practice that profession. In affirming a conviction for the unlicensed practice of pharmacy, our Supreme Court said with regard to an earlier form of Section 338.010:

"In our opinion there is no merit in the contention that the section of the statute upon which this prosecution is predicated is unconstitutional. That the General Assembly have the power by appropriate

Mr. Lloyd W. Tracy, Secretary

legislation to regulate the transaction of business by those who are engaged in dispensing drugs or medicines for medical use we have no doubt. While it may be true that the occupation of a druggist or pharmacist is highly beneficial to the public, yet it will not be seriously contended that a business where medicines are compounded and sold is frequently attended with a great danger to the people who are so unfortunate as to need the assistance of medical remedies. It has been uniformly recognized, by the courts of this as well as in foreign jurisdictions, that 'whenever the pursuit of any particular occupation or profession requires, for the protection of the lives or health of the general public, skill, integrity, knowledge, or other personal attributes or characteristics in the person pursuing it, the General Assembly has the power and the authority to have recourse to proper measures to insure that none but persons possessing these qualifications should pursue the calling.'" State v. Hamlett, (Mo. Sup. 1908), 110 S.W. 1082, 1083.

Until the effective date of House Bill 342, all persons under consideration here were presumably qualified to be examined by the Board and, upon successfully passing the examination, to be licensed as pharmacists. After House Bill 342 became law, there could be no authorization for testing or licensing persons under Section 338.045 unless it could be held that the recent action of the Legislature failed to remove all effect of the section or that while the section was in existence, those who qualified thereunder acquired rights of which they could not be divested by subsequent legislative action.

In City of St. Louis v. Kellman, (Mo. Sup. 1911) 139 S.W. 443, the Court said, l.c. 445:

"[2] Attending to that term, what does the word 'repeal' mean, when used by lawmaker or judge? 'Repeal' is defined as the abrogation or annulling of a previously existing law by the enactment of a subsequent statute, which either declares that the former law shall be revoked and abrogated, or which contains provisions so contrary to or irreconcilable with

Mr. Lloyd W. Tracy, Secretary

those of the earlier law that only one of the two can stand in force; the latter is the 'implied' repeal heretofore mentioned; the former, the 'express' repeal. Black, L. Dict. tit. 'Repeal.' Bourvier defines it to be: 'The abrogation or destruction of a law by a legislative act.' Bouv. L. Dict. tit. 'Repeal.' (Note the word 'destruction.') Webster defines it: 'To recall; to rescind or abrogate by authority; to revoke.' He gives among its synonyms 'annul,' 'cancel,' 'reverse,' 'abolish.' He defines the noun 'repeal' as meaning 'revocation'; 'rescission'; 'abrogation.' Abrogate, in turn means to annul by an authoritative act; to abolish by the authority of the maker; to repeal. Other instructive shades of meaning come out in accredited definitions of the several synonyms, but the foregoing are enough for our purpose."

In the terms of the above quotation it is obvious that House Bill 342 effected an "express repeal" of Section 338.045, thereby completely eliminating it from legal existence.

That one may not acquire vested rights to practice without license the professions controlled by the police power of the state is an uncontroverted principle of the law of Missouri.

The case of State v. Davis (Mo. Sup. 1906) 92 S.W. 484 grew out of a conviction of the defendant for practicing medicine without a license. One of the defenses advanced therein was that the defendant had engaged in the practice of medicine in Missouri almost fifty years prior to the enactment of the statute under which he was being prosecuted and that he had thereby secured the right to practice without obtaining a license. The Court held with respect to this contention, 1.c. 489:

"It is apparent that the General Assembly of Missouri, in the enactment of the provisions of law regulating the practice of medicine and surgery in this state, intended to fix a standard as to fitness, skill, and qualification which would authorize the practice of that profession. This law does not undertake to deprive any person of a vested right, for there can be no such thing as a vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice

Mr. Lloyd W. Tracy, Secretary

of medicine or surgery, nor to prohibit any particular person from practicing as a physician or surgeon, but it simply undertakes to require the necessary and essential qualifications for that purpose. The correctness of the conclusions as herein indicated are fully supported by the well-considered cases of this country. (Citing cases) We see no necessity for pursuing this subject further. It is clearly manifest that the defendant had no vested right to practice medicine in this state by virtue of his former practice here in 1857. Upon returning to this state to practice his profession, his qualifications, fitness, and skill to do so must be judged by the law in force at the time he so returns, and before he will be authorized to engage in the practice of his profession and reap the rewards from such practice, there is no reason why he should not comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice." (Emphasis added.)

The Davis case was recently followed by the Supreme Court in *State v. Errington*, (Mo. Sup. 1958) 317 S.W. 2d 326, 330, in which the court ruled that a person had no natural right to engage in the practice of naturopathy without benefit of a license to practice medicine.

With regard to the persons who took the examination given under the provisions of Section 338.045 some three days after its repeal became effective, we must hold that their testing was not authorized by any law or right in existence at that time. Licenses granted on the basis of such examination would likewise be unauthorized. For just as there can be no vested right to practice medicine as a result of having previously done so, there can be no enduring right to be examined and licensed as a pharmacist as a result of having once been so qualified under a now defunct statute. Anyone seeking to practice pharmacy in Missouri must "comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice." *State v. Davis*, supra. As of October 13, 1961, the only routes to admission to the practice of pharmacy are those provided by the statutes other than Section 338.045.

Mr. Lloyd W. Tracy, Secretary

We are fully aware that the effect of this opinion may be to deprive this state of the benefits of having some persons practice pharmacy who in fact may be well qualified to do so. However, we must measure their qualifications by the criteria existing at the time they endeavored to enter the profession. We are faced here with a set of laws made strict by the legislature and interpreted narrowly by the courts for the protection of the public. We can do no less than construe those laws so as to vitalize the obvious legislative intent that brought them into existence, as regrettable as such a holding might be in regard to some competent individuals who desire to practice pharmacy.

CONCLUSION

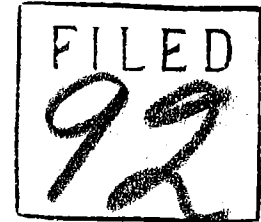
It is the opinion of this office that Section 338.045, RSMo 1959, went out of legal existence on October 13, 1961, taking with it all privileges which had accrued thereunder. Therefore, the Board of Pharmacy, subsequent to October 13, 1961, may no longer issue licenses pursuant to the authority granted by that section. This would be true notwithstanding the date upon which application for examination under that statute was filed, the fact of the applicant's prior qualification, or the fact that the applicant had actually taken such an examination and failed it during the existence of Section 338.045.

This opinion which I hereby approve was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:aa:ms



July 6, 1961

Honorable A. Basey Vanlandingham
Missouri State Senator for 19th District
Missouri State Senate
Jefferson City, Missouri

Dear Senator Vanlandingham:

This office is in receipt of your opinion request of February 6, 1961, which is as follows:

"I should like an opinion from your office as to whether or not the consent of a natural father is necessary to the adoption by the mother of the child and her second husband. It appears that consent to adoption is not required when the parent has abandoned or willfully neglected to provide proper care and maintenance for the child for a period of at least one year immediately prior to the filing of the petition for adoption, and also by Section 453.060, Vernon's Annotated Revised Statutes, service of summons and a copy of the petition is not required unless consent to adoption is itself required.

"Are the amendments, as adopted by House Bill No. 438, Section 1, Laws 1959, intended to do away with the necessity of serving a parent, such as the father, where a one-year neglect to maintain or care for the child exists?

I.

Your first query states: "--whether or not the consent of the natural father is necessary to the adoption by the mother of the child and her second husband."

Although not expressly stated in your letter, I am assuming that the natural father of said child was the former husband of petitioner, and that the child was born during wedlock.

Section 453.030(3), RSMo 1959, states:

"With the exceptions specifically enumerated in Section 453.040, when the person sought to be adopted is under the age of twenty-one years, the written consent of the parents, or surviving parent, of such person, or of the mother alone of such person if such person was born out of wedlock, to the adoption shall be required and filed in and made a part of the files and record of the proceeding, * * *."

Section 453.040(4), RSMo 1959, further provides:

"The consent of the adoption of a child is not required of a parent who has for a period of at least one year immediately prior to the filing of the petition for adoption, either willfully abandoned the child or willfully neglected to provide him with proper care and maintenance."

In *In re Slaughter*, 290 S. W. 2d 408, the natural mother of a 13 year old child appealed from a decree of adoption rendered by the Juvenile Division of the Circuit Court of Pulaski County, Missouri, on a petition to adopt said child. Petitioners' amended petition had alleged that the child had been declared a neglected and dependent child of the Circuit Court of Dent County, Missouri, on the 20th day of May, 1949, and made a ward of the court under the supervision of the State Health and Welfare Agency; that the child's parents wilfully neglected to provide said minor with proper care and maintenance for a period of more than one year next before the filing of adoption petition; that petitioners have had actual custody of the child since June 1953.

The natural mother filed answer to the amended petition in which she denied that the child had been declared

a neglected child by the Juvenile Division of the Circuit Court of Dent County and made a ward of the court and specifically denied that she had wilfully abandoned said child and wilfully neglected to provide him with proper care and maintenance for a period of one year before the filing of the adoption petition. She asked the court to deny petitioners' request for adoption.

In affirming the decree of the Circuit Court, granting adoption to petitioners, the Supreme Court stated, l.c. 412:

"Our courts may not decree an adoption of any minor without the consent of the natural parents unless such parent, for a period of at least one year immediately prior to the filing of the petition, has either wilfully abandoned such minor or wilfully neglected to provide him with proper care and maintenance, and, the question presented in the case at bar is whether the mother may be fairly said to have wilfully abandoned the minor sought to be adopted, or wilfully neglected to provide him with proper care and maintenance for one year immediately prior to the filing of the adoption petition."

Although Section 453.040(4), RSMo 1959, expressly states that consent of a parent is not required in an adoption proceeding where such parent has wilfully abandoned the child or wilfully neglected to provide said child with proper care and maintenance for the period of one year immediately before the filing of the adoption petition, it is to be noted that the parent's consent is not to be dispensed with under Section 453.040(4) upon the ground of abandonment or neglect unless it is shown by petitioners that such abandonment or neglect was wilful.

"* * * The statute obviously contemplates the same result, and the parent's consent to the adoption is not to be dispensed with upon the ground of his neglect of his

Honorable A. Basey Vanlandingham

4

child unless it is shown that such neglect was intentional, deliberate, and without just cause or excuse, evincing a settled purpose to forego his parental duties over the period of time which the statute prescribes * * *."

In re Perkins, 117 S.W. 2d 686, 1.c.692.

II.

The second part of your question states:

"Are the amendments, as adopted by House Bill No. 438, Section 1, Laws 1959, intended to do away with the necessity of serving a parent, such as the father, where a one-year neglect to maintain or care for the child exists?"

House Bill No. 719, which, as you know, was passed by the Missouri Senate on June 28, 1961, without amendment has amended Section 453.060(2), RSMo 1959.

Although said Bill has not been signed, there is no reason to believe the Governor will not do so.

As a result of the amendments in said Bill, the second part of your question has been specifically answered by this legislation.

I sincerely hope that the foregoing fully and satisfactorily answers your inquiry.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

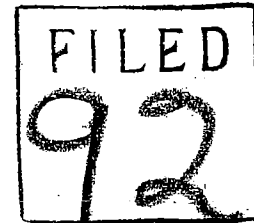
GWD lc
1 enclosure

COUNTIES:

COUNTY COURT:

County Court may lease out real property of county for short periods but may not enter into a lease for a term of 99 or 20 years.

July 28, 1961



Honorable Harold L. Volkmer
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Volkmer:

This office is in receipt of your recent request for an opinion which reads as follows:

"I am requesting that your office furnish me with an opinion on the questions arising out of the following matter.

"Marion County owns a building and tract of land of approximately two hundred and fifty acres at Palmyra, Missouri. The building was formerly used as the County infirmary and is now leased on a yearly basis to a private individual, who operates a nursing home in the building. At the present time the approximately two hundred and fifty acres are used by the lessee of the rest home building to raise crops. However, the Marion County Court has been approached by individuals requesting that they be permitted to lease the ground on a long-term lease of at least twenty years and perhaps ninety-nine years. The lease would be for the purpose of constructing a factory building on the land and the leasing of the building by the individuals to industry to be located in Palmyra.

"It is also my understanding that if the County Court is not able to enter into any such long-term lease, they may wish to sell the land without the building.

"The questions presented for which I am requesting your opinion are as follows:

Honorable Harold L. Volkmer

"1. Whether or not a County Court in a third-class county can enter into a lease with an individual, individuals, or a corporation for the leasing of real estate owned by the County for a period of more than one year, and if so, what period of years.

"2. What procedure must a County Court follow in order to sell county-owned land.

"I would appreciate a prompt reply to this request."

Section 49.270, R.S. Mo. 1959 provides:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Although that statute gives the county court "authority to . . . lease," this office is unwilling to read the statute as empowering county courts to dispose of real property by long term leases. The context of the above quoted phrase would indicate a legislative intent to permit counties to acquire land by lease but not necessarily to dispose of it in that manner. It should be noted that "lease" is sandwiched between the phrases "to purchase . . . or receive by donation." In the next clause of the cited section, the county court is empowered "to sell and cause to be conveyed any real estate. . . appropriating the proceeds of such sale to the use of the" county. (Emphasis added.)

Short term rental agreements whereby the county court permits private individuals to occupy and use county owned land for a consideration are valuable sources of income for the county, and we have little difficulty in finding them to be consistent with the legislative intent manifested in the words, "The said court shall have control and management of the property, real and personal, belonging to the county. . ." From these words as well as from judicial pronouncements concerning the

Honorable Harold L. Volkmer

functions and powers of county court, Odell v. Pile (Mo. Sup. 1953) 260 S.W. 2d 521, 527, Butler County v. Campbell (Mo. Sup. 1944) 182 S.W. 2d, 589, 591-592, it is clear that these bodies are charged with the stewardship of county owned property and are authorized to do what is necessary to carry out this task. That short term rental agreements may occasionally be the most expeditious manner of fulfilling this duty, with respect to a particular piece of land, cannot be disputed.

In Aslin v. Stoddard County (Mo. Sup. 1937) 106 S.W. 2d 473, the contention was made that a contract to employ a court-house janitor was void because it had been entered into by a county court on the last day of the term of office of two of its three members and was to run for one year thereafter. After observing that, l.c. 475, "the county court is a continuing body--not a succession of different boards or 'courts';" the Supreme Court upheld the contract saying, l.c. 475:

"Many contracts, proper enough and reasonable as to time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs."

The Court continued, l.c. 477:

"In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold."

In 20 C.J.S., Counties, Section 170, we find the statement that a county court may not enter into a lease of county property "unless expressly or impliedly authorized to do so, as where they are given control of county property; . . ." Section 49.270, supra, expressly gives the court "control and management" of county property.

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However, a lease by which a county deprives itself of the use of land belonging to it for ninety-nine years or even twenty years may not reasonably be placed in the same category as those discussed above. Such an arrangement is tantamount to a permanent deprivation of possession which the legislature has directed will be by sale.

The above cited section of Corpus Juris Secundum expresses another limitation on the power of the county court to lease out county property, viz., that the temporary dispossession of the property be consistent with the public use the county has or will have for the property. This rule was stated by the Georgia Supreme Court in Killian v. Cherokee County (Ga. 1929) 150 S.E. 158 wherein the power of counties to lease out land was considered. There the court said succinctly, l.c. 171, "The county board cannot, in the absence of statutory authority, make a lease of any part of the county property used or useful for county purposes."

The same principle was set out in Minimax Gas Co. v. State ex rel. McCurdy, (Ohio, App. 1929) 170 N.E. 33, which was brought to eject defendant gas company from certain real property it occupied pursuant to a lease entered into with the county. Under the terms of the lease, the county had the right to cancel at will and had notified the defendant that it was exercising its prerogative. When the defendant failed to vacate, suit was brought.

In discussing the inherent power of a county to enter into such a lease, the court said, l.c. 35-36,

"Other counties have found it convenient and profitable to temporarily lease property for which there was no immediate need, and we hesitate to unequivocally condemn a practice that properly carried out results in even a slight public advantage. Moreover, it appears a forced interpretation to say that the General Assembly, in regulating the sale of county real estate for which the county has no use, intended to inhibit the leasing of property which the county could not sell. This appears to us not only a strained construction, but one not necessary to fully protect the public interests. Until the commissioners find that county real estate is 'not needed for public use' all such property must be deemed of some potential use to the county. So long as it has such potential use, the interests of the county do not require its sale, nor does section 2447 permit its sale.

Honorable Harold L. Volkmer

In the absence of a finding that would enable the commissioners to sell, title must be retained by the county, but, under the doctrine of the Reynolds case, supra, there is no reason why it should not be temporarily leased, subject to repossession whenever the public needs so require."

Therefore, the permissible duration of a lease granted by a county will be governed by the needs of the county as to the land that is leased; and a lease may not be for such a term of years as to prohibit the county from applying it to a public use within a reasonable time, if such a need should arise.

In response to your second query, the procedure to be followed for a sale of real property by a county is set out rather clearly in Section 49.280 which provides:

"The county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and in behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed."

Other matters relating to such a sale were extensively treated in a prior opinion of this office prepared at the request of Mr. Charles E. Murrell, Jr., and forwarded under date of March 19, 1951. A copy of that opinion is enclosed herewith. Your attention is also invited to another opinion, also enclosed, issued at the request of Hon. J. R. Gideon on February 18, 1949.

CONCLUSION

It is the opinion of this office that, while county courts may properly enter into leases for periods up to several years depending on the requirements of the particular situation, they do not have authority to dispossess the county of real property by leases for terms of twenty or ninety-nine years. If the county court desires to effect such a transfer, it must be

Honorable Harold L. Volkmer

accomplished by sale of the property in accordance with applicable case and statutory law.

This opinion which I hereby approve, was prepared by my assistant Mr. Albert J. Stephan, Jr., Assistant Attorney General.

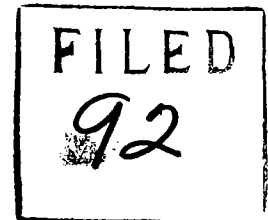
Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:BJ

RECORDED OF DEEDS: Consent of a parent or guardian is required when
MARRIAGE LICENSES: a license is issued under a court order to a
MINORS: minor under fifteen years of age. No three day
waiting period required by Section 451.040, RSMo
1959. May be waived by a circuit or probate court
for good cause shown. No requirements in Section
451.050, RSMo 1959, regarding serological tests
can be waived by any court except in case one of the
applicants is pregnant or on the death bed. Section
451.090, RSMo 1959, does not authorize a court
to order a license issued to an applicant over
fifteen years of age.

November 14, 1961



Honorable Harold L. Volkmer
Prosecuting Attorney
Marion County
Court House
Hannibal, Missouri

Dear Mr. Volkmer:

On August 3, 1961, you requested an opinion from this office
on the following questions:

"1. What documents are necessary to
be presented to the County Recorder
of Deeds by an applicant for a
marriage license prior to his issuing
a marriage license to a person under
fifteen years of age. What additional
document, if any, is necessary to be
presented to the County Recorder of
Deeds if the applicant wishes to have
the license without having to wait the
three-day waiting period.

"2. What documents are necessary to
be presented to the County Recorder
of Deeds by an applicant prior to his
issuing a marriage license to a male
between the age of fifteen years and
twenty-one years or a female between
the age of fifteen and eighteen years.
What additional document, if any, is
necessary to be presented to the County
Recorder of Deeds if the applicant
wishes to have the license without
having to wait the three-day waiting
period.

Honorable Harold L. Volkmer

"3. What documents are necessary to be presented to the County Recorder of Deeds by an applicant prior to his issuing a marriage license to a male twenty-one years of age or older or a female eighteen years of age or older. What additional document, if any, is necessary to be presented to the County Recorder of Deeds if the applicant wishes to have the license without having to wait the three-day waiting period.

"4. Does the fact that a female applicant is pregnant with child relieve either a male or a female applicant from the necessity of providing any of the documents that may be required in the situations designated in questions 1, 2, and 3 above."

In a letter accompanying your request you state you understand marriage licenses are being issued to persons under fifteen years of age solely upon the order of a probate or circuit court and a health certificate as required by Section 451.050, RSMo. You also state that you understand marriage licenses are issued to males under the age of 21 and females under the age of eighteen and at least fifteen years of age solely upon the application of the probate court or circuit court and a health certificate as required by Section 451.050. You further state that the consent of the parents or guardian is not required before a license is issued under the above conditions. You also express your opinion as to what you consider is a correct construction of Sections 451.040 and 451.090. We wish to thank you for furnishing us with your views regarding the matter you have submitted.

On August 14, 1961, you submitted an additional question as follows:

"May a County Recorder of Deeds issue a marriage license upon order of the Probate Court to a male applicant who is under the age of twenty-one years or a female applicant who is under the age of eighteen years although no written consent of a parent or a guardian is provided. Would the same apply if the applicant is under fifteen years of age, and would the County Recorder of Deeds

Honorable Harold L. Volkmer

be in contempt for refusing to obey
any such order."

In determining the answers to the questions you have submitted, certain statutory provisions must be considered. Section 451.040, RSMo 1959, provides in part:

"1. Previous to any marriage in this state, a license for that purpose shall be obtained from the officer authorized to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages.

"2. Before applicants for a marriage license shall receive a license, and before the recorder of deeds shall be authorized to issue a license, the parties to the marriage must, at least three days before the date they desire such license to be issued, present an application for the license to the recorder of deeds. Upon the expiration of three days after the receipt of such application, duly executed and signed, the recorder of deeds shall issue the license, unless one of the parties withdraws the application.

"3. Provided, however, that said license may be issued on order of the circuit or probate court or a judge thereof in vacation of the county in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual condition as to make such marriage advisable."

Subsections 4, 5, and 6 of the above statute are immaterial to the questions under consideration and are not quoted herein.

It should be observed that under subsection 2, quoted above, applicants for a marriage license must present their

Honorable Harold L. Volkmer

application at least three days before the date they desire a license and the recorder of deeds must wait at least three days after the date of application before a marriage license may be issued.

Subsection 3, quoted above, provides in substance that a marriage license may be issued on an order of the circuit court or probate court or judge thereof in vacation in the county where the license is applied for without waiting the three day period when the court finds good cause therefor and such unusual conditions as to make such marriage advisable.

It is our opinion the only authority given the circuit court or probate court under subdivision 3 is to determine whether the license should be issued without waiting for the three day waiting period. This section does not authorize said courts to waive compliance with any other statutory provisions other than the three day waiting period.

Section 451.090, RSMo 1959, provides as follows:

"1. No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age; provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable.

"2. And no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths.

"3. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are

Honorable Harold L. Volkmer

of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-one years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

Subsection 2 and 3, in substantially the same form and substance, were enacted in 1881 and provided that no recorder should issue a license to any male under twenty-one years of age or any female under the age of eighteen without the consent of a parent or guardian (Laws 1881, page 162). Under this statute a person under the age of fifteen years could obtain a license with parent's consent.

In 1919 the statute as enacted in 1881 was amended by adding subsection 1, which provides that no recorder shall in any event except as therein provided issue a license authorizing the marriage of any person under fifteen years of age, provided, however, said license may be issued on an order of the circuit court or probate court for good cause being shown and by reason of such unusual conditions as to make such marriage advisable. Under this statute only on the orders issued by a court on a finding of good cause and under such unusual conditions which the court considers makes such marriage advisable can a license be issued for the marriage of a child under fifteen years of age.

The evil which the statute as amended in 1919 sought to remedy was the consummation of marriages of children under the age of fifteen years even though the parents or guardian had consented without regard to whether such marriages were advisable. It is our opinion the amendment created an additional safeguard in the public interest, limiting the otherwise mandatory result which theretofore had followed from the giving of parental consent but it did not eliminate the necessity for such consent.

Subdivision 2 of Section 451.090, supra, provides no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or any female under the age of eighteen years without parental or guardian's consent. The word "any" as so used would necessarily include males and females under the age of fifteen years as well as those above said age. That such was the intent would also

Honorable Harold L. Volkmer

appear from the fact that subsection 3 of said statute requires the recorder to state on every license (if the male is under twenty-one years or the female is under eighteen years) the name of the father, mother or guardian consenting to such marriage.

It is our view Section 451.090, supra, when read as a whole and harmonizing all the provisions in accordance with requisite rules of statutory construction, should be construed to mean:

1. No license may be issued to any male under the age of twenty-one or any female under the age of eighteen years except with consent of the parent or guardian.

2. In no event shall such consent of the parent or guardian be effective to authorize the issuance of a license to a person under fifteen years of age unless the proper court has also issued the requisite court order. That is to say, as to children under fifteen years of age, a court order is necessary in addition to parental consent but not as a substitute for it.

It is also our opinion that subsection 1, supra, does not confer authority or authorize a circuit court or probate court to order a license issued to persons over the age of fifteen years who apply for such license without the consent of the parent as required by subdivision 2 of said section. Therefore, there is no authority under this section for the circuit court or probate court to order a marriage license issued to any applicant over the age of fifteen even on the basis that unusual conditions make such marriage advisable. The fact that one of the parties is pregnant at the time of the application does not alter this rule or eliminate the requirement of parental consent.

Section 451.050, RSMo 1959, requires applicants for a marriage license to file with the recorder certain laboratory reports and affidavits as to applicants' physical condition regarding syphilis before a marriage license shall be issued. It applies to all applicants without regard to the age of the applicant. This section expressly states that the recorder may waive the requirements of this statute if a certificate of a physician is filed stating that an applicant is pregnant. It does not authorize the court to waive this statutory requirement.

CONCLUSION

It is our opinion that Section 451.040, RSMo 1959, authorizes a circuit court or probate court or judge thereof

Honorable Harold L. Volkmer

in vacation for good cause shown and by reason of such unusual conditions which make such marriage advisable, to order the license issued without waiting three days after the application is made before the license issued as required by subsection 2 of Section 451.040. It is our opinion this section authorizes the court to waive the three day waiting period but does not authorize said courts to waive any other statutory requirement such as the serological test of Section 451.050 or the parent's consent as required by Section 451.090.

It is our opinion that Section 451.090, RSMo 1959, authorizes a circuit court or the probate court in the county where the application is made for a marriage license for the marriage of a person under fifteen years to order the license issued, when the court finds good cause exists and such unusual conditions as to make such marriage advisable. However, consent of the parent or guardian must be obtained before the recorder shall issue the license.

It is also our opinion that subdivision 1 of Section 451.090, RSMo 1959, does not authorize or empower the circuit or probate court to order a license issued to an applicant over the age of fifteen years even though the facts and conditions exist that would make the marriage advisable.

It is our further opinion that the requirements of Section 451.050, RSMo 1959, that certain reports and affidavits be filed with the recorder as to the applicants' physical condition regarding syphilis are applicable even when a court order is issued under Section 451.040 or under 451.090. However, said requirements may be waived by the recorder when a certificate of a physician is filed stating that one of the applicants for such license is pregnant.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

SENATORIAL APPOINTMENT

COMMISSION:
GENERAL ASSEMBLY:
SENATE:
REPRESENTATIVES:

1. Discretion of senatorial apportionment commission in establishing senatorial districts;
2. Board of Election Commissioners has sole authority to establish senatorial districts in City of St. Louis.
3. Senatorial apportionment commission has no authority in establishment of representative districts.

April 13, 1961

Honorable Sorkis J. Webbe
Member, Missouri Senate
Fourth District
Senate Post Office
Jefferson City, Missouri



Dear Senator Webbe:

This is in response to your request for an opinion dated February 28, 1961, which reads as follows:

"I am submitting to you this letter as a request for an opinion on the following subjects:

"Under the Constitution of the State of Missouri, what authority does the ten-man committee appointed by the Governor have in the redistricting of the State of Missouri as it relates to State Senatorial and State Representative Districts? By this I mean, what percentage of leeway are they allowed in setting up each State Senatorial and State Representative District?

"I should also like to know what are the Constitutional provisions relating to this ten-man committee establishing the State Representative and State Senatorial Districts within the City of St. Louis. By this I mean, can this ten-man redistricting committee set St. Louis State Senatorial and State Representative Districts and not refer this to the City Board of Elections Commissioners to set these boundaries?"

Inasmuch as your inquiry refers to representative districts, it should be noted at the outset that the Constitution of Missouri

provides for the establishment of a senatorial apportionment commission. The commission is not authorized to reapportion or redistrict representative districts. Those districts are covered by Sections 2 and 3 of Article III of the Constitution, which sections read as follows:

Section 2.

"The house of representatives shall consist of members elected at each general election and apportioned in the following manner. The ratio of representation shall be the whole number of the inhabitants of the State divided by the number two hundred. Each county having one ratio, or less, shall elect one representative; each county having two and a half times the ratio shall elect two representatives; each county having four times the ratio shall elect three representatives; each county having six times the ratio shall elect four representatives, and so on above that number giving an additional member for every two and a half additional ratios. On the taking of each decennial census of the United States, the secretary of state shall forthwith certify to the county courts, and to the body authorized to establish election precincts in the City of St. Louis, the number of representatives to be elected in the respective counties."

Section 3.

"When any county is entitled to more than one representative, the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one representative shall be elected."

The senatorial apportionment commission is authorized by Section 7, Article III, as follows:

"Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial

census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall reapportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such re-apportionment shall be subject to the referendum."

The Supreme Court has held, in the case of *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 SW 40, that the act of establishing senatorial districts, whether accomplished by the General Assembly or by some other group or body, is an exercise of legislative authority. As the court said, at l.c. 48:

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"That the districting of the state into legislative, senatorial, congressional, and judicial districts is the exercise of legislative authority cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the United States government. That authority is akin to and flows from the same power and authority that fixes the boundary lines of the state, and subdivides the state into counties, etc. Not only that, but the very same section of the Constitution which authorizes and empowers the Legislature proper to apportion and redistrict the state into senatorial districts also provides for and empowers this body of three state officials to redistrict it, in case the General Assembly neglects or fails to do so. That being true, and both deriving their authority from the same source, and performing precisely the same duties, it must stand to reason that, if the labors of the General Assembly are legislative, then the work of this body must also be legislative in character. We call the one an act of the General Assembly, the other the statement of the Miniature Legislature."

Since the function is legislative, the senatorial apportionment commission, as set up under the Constitution of 1945, must act in the exercise of a delegated legislative power.

The standards by which the commission is to be guided are set out in Section 5 of Article III, as follows:

"The senate shall consist of thirty-four members elected by the qualified voters of the respective districts for four years. For the election of senators, the state shall be divided into convenient districts of contiguous territory, as compact and nearly equal in population as may be. No county shall be divided in the making of districts composed of more than one county."

While under the terms of this section the commission is necessarily granted a certain discretion in the establishment of senatorial districts, the courts have seen fit to pass on the exercise of that discretion, and in so doing have, to some extent, prescribed its limits. In *Preisler v. Doherty*, 365 Mo. 460, 284 SW2d 427, 1.c. 431, our Supreme Court said:

"It is well settled that courts have jurisdiction and authority to pass upon the validity of legislative acts apportioning the state into senatorial or other election districts and to declare them invalid for failure to observe non-discretionary limitations imposed by the Constitution. *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, loc. cit. 473, 146 S.W. 40, loc. cit. 53 and cases cited; Annotation A.L.R. 1337; 18 Am. Jur. 191-201, Secs. 16-31; 16 C.J.S., Constitutional Law, § 147 p. 438. See also *Jones v. Freeman*, 193 Okl. 554, 146 P. 2d 564, loc. cit. 570, stating that the courts of 38 states had exercised this power. However, as these authorities show, the courts may not interfere with the wide discretion which the Legislature has in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis. As said in a leading case, *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 55, 17 L.R.A. 145: 'If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the

conclusion is inevitable that the legislature did not use any judgment or discretion whatever.' Likewise, In re Sherill, 188 N.Y. 185, 81 N.E. 124, 128, the Court said: 'But, if the Legislature under the assumption of an exercise of discretion does a thing which is a mere assumption of arbitrary power, and which, in view of the provisions of the Constitution, is beyond all reasonable controversy, a gross and deliberate violation of the plain intent of the Constitution, and a disregard of its spirit and the purpose for which express limitations are included therein, such act is not the exercise of discretion, but a reckless disregard of that discretion which is intended by the Constitution. Such an exercise of arbitrary power is not by authority of the people. It is an assumption, and, when it is claimed that an act is thus in violation of the Constitution, a question of law is presented for the determination of this court.' Thus, in the matter of districting, as well as in other matters, the Legislature has no authority to enact unconstitutional laws."

In that case, the court ruled that the senatorial districts established by the Board of Election Commissioners in the City of St. Louis violated the constitutional requirement of compactness.

The nature of the discretion granted a redistricting body was considered by the Supreme Court in *State ex rel. Barrett v. Hitchcock*, supra. Though the case was decided under the Constitution of 1875, the constitutional limitations on legislative discretion in the establishment of senatorial districts were practically identical with Section 5 of Article III, previously quoted. The court considered those limitations as being of two kinds, the first class being those which leave no discretion to the redistricting body and the second being those which grant a limited discretion. The court said (146 SW 53):

"The first class of duties before mentioned, namely, those which must be performed by the Legislature without the exercise of any discretion upon its part, may be subdivided into

three other classes, viz.: (a) That the Legislature shall divide the state into 34 senatorial districts; (b) that when a district is to be composed of two or more counties they must be contiguous; and (c) that in forming a district, to be composed of more than one county, no county shall be divided; that is, one part of a county shall not be placed in one district and the remainder placed in another.

"And the second class of duties before mentioned, namely, those which must be performed by the Legislature, but in the performance of which it may exercise a limited degree of discretion, may be divided into: (a) It shall make each district as nearly equal in population as is practical, or as may be done. (b) That when a district is to be composed of more than two counties it shall be as compact as it can reasonably be made."

Applying these principles, the court went on to state (146 SW54):

"As regards the first class of limitations mentioned, it is sufficient to state that there is no special controversy as to it; it being practically conceded by counsel that the limitations therein stated were observed and substantially complied with by the Legislature in the formation of the districts, and it will therefore be put aside. However, the limitations mentioned in the first class are so closely interwoven and intimately connected with those stated in the second that what may be said regarding the one will necessarily apply more or less to the other.

"This brings us to the consideration of the second class of duties previously mentioned, or those powers delegated by the Constitution upon the Legislature, with a limited discretion. I use the

words, 'limited discretion,' for the reason that the Constitution, in express terms, limits the discretion by providing that the Legislature shall apportion the state into districts; but in doing so it shall make each district as nearly equal in population as may be, and that when a district is to be composed of more than two counties they shall be as compact as may be convenient. The words italicized show conclusively that it was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper, nor to give to each a population which it deemed best. Had the framers of the Constitution intended that the Legislature should apportion the state into districts according to its own free and untrammelled will, then they would not have used the words of restriction before mentioned. This is too plain for argument. Therefore, having seen that the authority and discretion of the Legislature is thus limited, it would be error to treat the proposition upon the theory that the Legislature had unlimited discretion in the matter, and for that reason many of the authorities cited and relied upon have no application to this case; they dealing with officers whose discretion was un-restricted."

From the foregoing, it seems clear that the commission, under the present Constitution, is totally without discretion, in that (1) there must be thirty-four districts; (2) counties composing a multi-county district must be contiguous; and (3) in districts composed of more than one county, no county shall be divided.

Constitutional requirements as to the population of each district, however, leave a limited discretion in the commission. While Section 7 of Article III states that no district shall vary from the established quotient by more than one-fourth, Section 5 of Article III provides that districts shall be "as nearly equal in population as may be." Reading the two provisions together, it is apparent that the commission is constitutionally required to provide equality in population among the

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districts to the extent possible, but in no event may any district exceed the outside limits of population set out in Section 7 of Article III of variance in excess of one-fourth from the quotient.

Finally, as the cases quoted above demonstrate, the constitutional requirement of compactness imposes a further limitation on the discretion of the commission, and the Supreme Court will set aside a redistricting plan reflecting a gross abuse of that discretion. It is impossible to state the limits of the commission's discretion as regards the requirement of compactness. However, the careful language of both the Preisler and Hitchcock cases, *supra*, would seem to indicate that the court will hesitate to substitute its discretion for that of the commission, doing so only in case of a clear, deliberate and reckless disregard of the Constitution.

One factor which the Supreme Court has used as a guide in passing on a legislative redistricting is whether those districts most lacking in compactness compare favorably with others in terms of equality of population. In both the Preisler and Hitchcock cases the court pointed out that those districts most lacking in compactness also had the greatest variance from the equal population figure. As the court there stated, the necessity of equalizing the population of each district may necessarily detract from the desired compactness, but where districts lack logical coherence and vary widely in population the conclusion is inescapable that the constitutional standard is being violated.

Your final question pertains to the authority of the senatorial apportionment committee to establish districts within the City of St. Louis.

Section 8 of Article III reads as follows:

"When any county is entitled to more than one senator the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one senator shall be elected."

The Board of Election Commissioners is the body authorized to establish election precincts in the City of St. Louis. Section 118.150, RSMo 1959. By the terms of Section 8 of Article III, a

Honorable Sorkis J. Webbe

clear and unequivocal grant of authority is made to the Board of Election Commissioners, which authority must be exercised by that Board alone to the exclusion of the commission.

CONCLUSION

It is the opinion of this office that:

1. The senatorial apportionment commission has no authority in the establishment of state representative districts;

2. The commission has no discretion, in that it may not vary from the number of districts constitutionally established, the requirement of contiguity within districts and the prohibition against dividing a county within a multi-county district. The commission has a limited discretion in establishing districts "as compact and nearly equal in population as may be." However, the court will review the exercise of this discretion and set aside the redistricting plan of the commission in the event of a gross abuse of discretion;

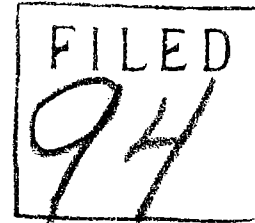
3. The Board of Election Commissioners of the City of St. Louis has the sole authority to divide the City of St. Louis into senatorial districts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JJM:ml



July 24, 1961

Honorable Robert P. Weatherford, Jr.
City Manager
29th Floor City Hall
Kansas City 6, Missouri

Dear Mr. Weatherford:

In re: Unlicensed Nursing Homes in
Kansas City

In recent months, both this office and the Division of Health have received numerous inquiries concerning the operation of unlicensed nursing homes in the City of Kansas City. As a result of these inquiries, we have reviewed the nursing home laws of Missouri. The purpose of this letter is to set out some of the general conclusions reached as a result of this review.

In 1957, the legislature enacted a new Nursing Home Act which is found in Chapter 198 of our statutes.

Sec. 198.021 reads as follows: License to operate home required

After ninety days from the date this law becomes effective, or at the expiration of any license issued under a prior law, no person shall establish, conduct or maintain a nursing, convalescent or boarding home in this state without a license issued under this law by the division of health of the department of public health and welfare.

This section makes illegal the operation of an unlicensed nursing home.

In order to enforce this section and "make a case" against an illegal operator, the Division of Health must have the right to inspect the premises in question so as to determine if in fact the place is being run as a nursing home.

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Sec. 198.062 reads as follows: Homes open to inspection, when

"Every home conducted by a licensee hereunder, and any premises proposed to be operated by an applicant for a license, shall be open at all reasonable times to inspection by the division of health and by any official designated by the division of health as provided in section 198.051."

Under this section, the inspection powers of the Division of Health are quite limited. The division is given the right to inspect only (a) licensed homes and (b) homes which apply for a license. The Division is not given the right to inspect unlicensed homes.

At the time the 1957 Nursing Home Act was being considered by the General Assembly, an effort was made to provide adequate inspection provisions so that all of the bill's provisions could be enforced. Efforts were made to broaden the scope of Sec. 198.062. These efforts were successfully opposed by those who felt that to broaden Sec. 198.062 would place too great a power in the hands of the Division of Health and would be a threat to our constitutionally guaranteed right of privacy and our right to be secure against unreasonable searches and seizures.

Thus, unlicensed or "bootleg" nursing homes can only be inspected under the most unlikely circumstance that the bootleg operator will voluntarily permit an inspection. Without the legal right to inspect, the Division of Health is hamstrung as far as the practical enforcement of the Act is concerned.

As we see it, there are only two ways in which the nursing home law provisions can be given the full effect originally intended. One way would be for the state legislature to revise and broaden the inspection powers provided in Section 198.062. The other method would be for the city of Kansas City to enact or re-enact ordinances consistent with our state statutes and thereby assist in the implementation of these statutes. In *City of St. Louis v. Evans*, 337 S.W.2d 948, the Missouri Supreme Court upheld the right of city inspectors to enter premises and inspect for the violation of ordinances. The court at p. 957 stated:

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"The constitutional provisions relied upon by respondents do not prohibit reasonable entry and inspection of premises used for the purposes for which the respondents' premises were used for when entry of such premises is sought for the purpose of administering ordinances relating to public health, safety and welfare, nor do they prohibit an inspection, such as was sought under the facts attendant to the second charge against each defendant. Nor is there any merit in respondents' contention that the city had no authority to enact Section 36 upon which the second charges are based."

It is our understanding that when the state legislature passed the Nursing Home Act, the city of Kansas City caused to be inactivated Chapter 28 of the city's ordinances pertaining to the operation of boarding and nursing homes within the city limits of Kansas City.

With the state law ineffective because of inadequate inspection provisions and with no city ordinances on the books, "bootleg" nursing homes can have a field day in Kansas City. This creates a serious threat to the health, welfare, and safety of the citizens of Kansas City which threat cannot be quickly eliminated by state action because the legislature will not meet again until January, 1963. Thus, any immediate remedial action will have to be taken by the City Council of Kansas City.

I strongly recommend that you and the Council consider whether the situation in Kansas City with respect to "bootleg" nursing homes is of sufficient seriousness and sufficient potential danger so as to require legislative action on the local level. If you should desire, our office would be only too happy to render any assistance deemed necessary to assist you or the City Counselor's office in drafting proper ordinances relating to this matter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

oh

cc: Dr. Hardwicke
Keith Wilson

STATE EMPLOYEES:

RETIREMENT:

STATE RETIREMENT SYSTEM:

An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment on the condition that said retired employees voluntarily pay a reasonable sum certain into said retirement system as a condition precedent to receiving said increased benefits would be valid.

May 12, 1961



Mr. Robert R. Welborn, Chairman
Missouri State Employees' Retirement System
State Capitol Building
Post Office Box 809
Jefferson City, Missouri

Dear Mr. Welborn:

This is in reply to your opinion request of February 13, 1961, wherein you state:

"The Trustees of the State Employees' Retirement System are contemplating recommending and supporting legislation providing for an increase in benefits to be paid to retired employees. The question has arisen whether or not such increased benefits may legally be paid to persons who have retired and are receiving benefits on the effective date of the increase.

"In order that the Board may properly present the matter to the General Assembly, your opinion is requested on this problem."

Basically, the interest of a participant in a municipal or State Employees' Retirement Plan is either an "annuity" or a "pension." The category of this interest is the determining factor in regard to vested rights of participants as well as the right to and validity of legislation increasing benefits to retired individuals under such plans.

In *State v. Public School Retirement System*, 262 S.W. 2d 569, 576, the Missouri Supreme Court set forth the characteristics of a pension as follows:

"... a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right. . . ."

Being gratuitous to the pensioner, an attempted increase by the legislature would be in violation of Article III, Section 39(3) of the 1945 Missouri Constitution, to wit:

"The general assembly shall not have power to grant or authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part."

In *Porter v. Loehle et al.*, 332 Ill. 353, 163 N. E. 689, the Illinois legislature amended the retirement statute of Chicago police officers by increasing the benefits paid to existing pensioners at the effective date of the amendment and authorized increased taxation for the purpose of providing additional revenue to pay the larger pensions. Section 19 of Article IV of the Illinois Constitution was identical to Article III, Section 39(3) of the Missouri Constitution. In declaring the amendment null and void, the Illinois Supreme Court stated:

"The amendatory acts increasing the pensions of retired policemen do not contemplate the rendition of additional services by the pensioners. They were paid when they performed their services and the amounts of their pensions were fixed by law when they retired. The increases are not granted for services to be performed by the pensioners, but have as their sole basis or justification the services which they rendered prior to their retirement. The obligations which the performance of those services imposed upon the public have been fully discharged. No obligation, either legal or moral, to pay more than the stipu-

lated compensation arises where no additional services have been or will be rendered. Extra compensation is a payment or allowance in excess of that which was fixed by law or contract when the services were rendered. Since the increase in the pension of retired policemen sought to be effected by the amendatory acts in question are based solely on the services rendered by them prior to their retirement, these increases necessarily constitute an extra allowance for past services. Such an allowance Section 19 of Article 4 of the Constitution expressly forbids, and the amendments . . . increasing the pensions paid to retired policemen, are therefore void. "

From the foregoing, it is abundantly clear that if the interest of those participants in the Missouri State Employees' Retirement Plan is a pension, those retired thereunder are pensioners, and, therefore, cannot be granted any increase by the legislature without being in violation of Article III, Section 39(3) of the Missouri Constitution,

On the other hand, the prime characteristic of an "annuity" is the voluntariness of the participation and contributions to the plan by the participants. For if voluntary, a binding contractual relationship is created between the state and the contributors, which terms may be altered or changed by mutual consent and consideration of the parties thereto.

This reasoning was adopted in *Raines v. Board of Trustees*, 365 Ill. 610, 7 N.E. 2d 489, wherein the Illinois Legislature had made an amendment to the Teachers' Pension and Retirement Fund Statute entitling teachers serving for 25 years or more, and being 70 years of age, who were retired and receiving an annual annuity of \$400.00 per year to increase said annuity to \$600.00 per year by voluntarily paying \$200.00 with interest into said fund. Under the original plan a teacher could voluntarily participate in the retirement plan or refrain from so participating. In holding such to be an annuity, giving the legislature the right to contract with the annuitants, the court stated:

"There is a wide difference between voluntary contributions to a fund under a statutory elective right and being compelled to suffer deductions without any such right. In the latter case, the officer or employee has no voice in determining whether or not he will suffer such exactions. They are imposed by the statute and deducted even if against his will. In the other case it is wholly a matter of choice with him. He may elect to come within the terms of the act and receive its benefits, or he may forego that privilege at his option, with no other effect than to deprive him of participating in the fund. If he does not elect to contribute, he receives and retains the full amount of his salary or wages. If he elects to contribute, the amounts are deducted by his direction. The effect is the same as if his full salary were paid to him and after it became his private means he in turn contributed to the retirement fund. In such case there is neither reason nor authority to hold that the fund remains public money in which he has no right or interest.

"The relations between voluntary contributors and the sovereign being contractual, it follows that the rights created are not measured by the rights of pensioners. They are similar, and amount, in effect, to insurance contracts providing annuities upon maturity of the contract or policy of insurance. The basis of such annuities is the same as the basis of any other contract. The consideration is the offer of the sovereign, the acceptance of the offer, and performance of its terms. It is a familiar principle that the Legislature possesses all powers not prohibited by the limitations of the Constitution. Among such powers is the power to contract, where the contract is not within

any constitutional inhibition or against public policy. The right of the State to contract for the payment of annuities to its officers and employees under prescribed conditions is not challenged and has been repeatedly upheld. No reason is observed why the parties to such a contract may not make provision for an optional increase of the annuity by providing for additional contributions to the fund. Under contracts based on optional voluntary contributions, the contributors have a substantial interest in the fund by virtue of the amounts paid in under the terms of the contract. The benefits to be derived are not gratuities from public funds for past services, and therefore an increase in such benefits in consideration of further contributions does not violate the constitutional provisions prohibiting extra pay for past services."

In order, however, to determine what the interest of a participant in the Missouri State Employees' System consists of, the language used by the Supreme Court of Missouri in *State v. Public School Retirement System*, 262 S.W. 2d 569, 1. c. 577, becomes pertinent:

"It is clear, however, that the rights of any beneficiary, or member of any retirement system can only be determined by very careful scrutiny of the detailed provisions of the particular statute controlling the creation and operation of the particular retirement system and under the particular facts of the case."

Thus, it becomes necessary to examine the Missouri State Employees' Retirement Plan to determine whether or not the interest of a participant therein is that of an "annuitant" or "pensioner." If such interest is that of a "pensioner," no valid increase at all can be given to said retired employees. But, if that of an "annuitant," a valid contractual agreement can be created whereby increased benefits may be legislated for said individuals.

A review of the Missouri State Employees' Retirement System discloses that under "Definitions" (Section 104.310, RSMo 1959), the word "annuity" is used, and defined as,

"(5) 'Annuity', annual payments, made in equal monthly installments, to a retired member from funds provided for in, or authorized by, sections 104.310 to 104.550;".

Throughout the entire act, the word "annuity" is used, and nowhere is found the word "pension."

In particular, Sections 104.390 and 104.400 state:

"The normal annuity of a member shall equal five-sixths of one per cent of the average compensation of the members multiplied by the number of years of creditable service of such member, except that the minimum annuity of any member who has served eight or more years as a member of the general assembly and who meets the conditions for retirement at or after normal retirement age shall consist of monthly payments made at the rate of ten dollars multiplied by the number of biennial assemblies in which he has served; provided, however, that the annuity of any member shall never exceed two-thirds of his average compensation.

"Any employee, after attaining sixty years of age and having had at least twenty years of creditable service, may retire with the consent of his employer. In such case the member shall receive a retirement annuity which shall equal five-sixths of one per cent of his average compensation multiplied by the number of years of creditable service of such member."

This constant usage of the word "annuity" would indicate that the legislature intended the interests and benefits of participants to amount to more than a "pension."

Section 104.330(1) further states:

"As an incident to his contract of employment or continued employment, each employee of the state shall become a member of the system on the first day of the first month following the effective date of sections 104.310 to 104.550, and every person thereafter becoming an employee shall become a member at the time of employment. Each employee's membership shall continue as long as he shall continue to be an employee;". . .

Therefore, as a condition precedent to employment, one may be deemed to have voluntarily submitted himself to this retirement plan.

This reasoning was adopted in *State v. Public School Retirement System*, 262 S. W. 2d 569, l.c. 578, wherein the court determined that the interest of participants in the Missouri Public School Teachers' and Employees' Retirement Plan was vested and an annuity due to participation in said plan being voluntary:

" . . . it was optional with the employees of the Board of Education of the City of St. Louis, when the plan was put into effect, to elect to come under the provisions of the Retirement System or to elect to stay out. Clearly, participation in the Retirement System was voluntary and not compulsory as to those who were employed at the time the Retirement System went into effect. Those employed since have consented to become members of the system as a condition to their employment. "

Therefore, one accepting and retaining state employment voluntarily submits to the State Employees' Retirement System and has a vested interest therein, creating a contractual relationship between the state and the participant, which can reasonably be amended by the legislature.

This conclusion is buttressed by Section 104.540(1), RSMo 1959, wherein these rights and benefits are, by statute, declared to be vested:

"1. All payroll deductions and deferred compensation provided for under sections 104.310 to 104.550 are hereby made obligations of the state of Missouri. No alteration, amendment, or repeal of sections 104.310 to 104.550 shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal."

By creating this vested right, the legislature has removed the benefits from the realm of gratuities, which may be terminable at will, either in whole or in part, by the state.

In addition, the language employed in Section 104.370(4) of the System clearly indicates that the legislature intended the contributions made by the State and participants to be funds of the Retirement System and not state funds.

"4. Such contributions and contributions by members are the funds of the system, and shall not be commingled with any funds in the state treasury . . ."

Because the annuity is created by a contractual relationship, the issue of consideration now arises in regard to an increase in benefits to those presently retired under the System.

There can be no question that a valid increase in benefits to retired individuals would lack the necessary mutual consideration and thus constitute a mere gratuity. As a result, such an increase would be in contravention of Article III, Section 39(3) of the Missouri Constitution, to wit:

"The general assembly shall not have power to grant or authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part."

The unconstitutionality of a naked increase in benefits to retired individuals would be particularly true in light of Section 104.370 which provides for contribution by the state to the fund.

Since the naked increase in benefits would be derived from a fund consisting in part of monies paid by the state into said fund, said increase would unquestionably be in violation of Article III, Section 39(3) of the Missouri Constitution.

Conversely, an increase in benefits to retired individuals predicated upon said individuals voluntarily paying a reasonable sum of money to the fund in order to receive the increased benefits would contain the necessary mutual consideration necessary to create a binding contractual relationship between the parties. The benefits under this Retirement System being an annuity, the right of the legislature to enter into such a contract would not be within any constitutional inhibition or against public policy.

As stated in *Raines v. Board of Trustees*, supra,

"The right of the state to contract for the payment of annuities to its officers and employees under prescribed conditions is not challenged and has been repeatedly upheld. No reason is observed why the parties to such a contract may not make provision for an optional increase of the annuity by providing for additional contributions to the fund. Under contracts based on optional voluntary contributions, the contributors have a substantial interest in the fund by virtue of the amounts

Mr. Robert R. Welborn

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paid in under the terms of the contract. The benefits to be derived are not gratuities from public funds for past services, and therefore an increase in such benefits in consideration of further contributions does not violate the constitutional provisions prohibiting extra pay for past services."

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that:

1. An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment without said employees voluntarily contributing a reasonable sum to the fund therefor, would be in violation of Article III, Section 39(3) of the Missouri Constitution.

2. An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment on the condition that said retired employees voluntarily pay a reasonable sum certain into said retirement system as a condition precedent to receiving said increased benefits would be valid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

SCHOOLS:
SCHOOL DISTRICTS:
SCHOOL FUNDS:

A school district may acquire realty by purchase or by gift. Such acquisition should not bind or restrict the school board's discretion of determining educational policy. Contractual arrangements can only be for a reasonable period of time. School funds can not be used to improve public roads:

January 25, 1961



Honorable Hubert Wheeler
Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your letter dated October 7, 1960, in which you request an official opinion from this office. In your letter you state that the Northwest Missouri State College at Maryville (hereinafter referred to as the College) is located within the R-2 School District of Nodaway County (hereinafter referred to as the School District). You mention that there is a possibility that the College may convey a tract of land to the School District "without any consideration being paid or any commitment being made" by the School District. However, you state that the College may require a commitment that the high school to be built on the conveyed tract of land be used for teacher training by college students, such training activities to be done through agreement with the board of education and with full control vested in said board. You conclude your letter by setting forth several inquiries.

"In the light of the provisions of the laws governing the board of education of public school districts in the use and control of school district property I shall appreciate your advice and official opinion in answer to the following questions:

1. Does the board of education of school district R-2 of Nodaway County have the authority to accept from the board of regents of the Northwest Missouri State College the proposed 30 acres site for the erection of a new central high school?

2. Does the board of regents of the State College at Maryville have the authority to convey the 30 acre tract to the R-2 board of education without any monetary consideration?

3. Would the board of regents have the authority to convey the land without monetary consideration but with the restriction that the board of education cooperate by permitting the college to carry on its practice teacher training, observation, and laboratory experiences in connection with the public schools? The correlary to this problem would be whether the board of education would have the right to accept this land under these conditions.

4. Could funds of the school district be used to improve the roads to the proposed site? This would involve not only improving the roads immediately adjacent to the site but the two roads leading to the site."

In answering the above question only those matters in relation to the School District will be discussed. Those questions seeking to establish the authority of the College to convey the proposed school site, with or without consideration, with or without restrictive covenants or conditions, will not be answered. This procedure is being followed in view of the fact that the State College Board of Regents is not under the control or authority of the State Department of Education, nor has your department any concern with whatever authority is exercised by the College. Thus, question number 2 and the first part of question number 3 will not be answered.

The answer to the first question is in the affirmative. This is based on the assumption that the School District is to "accept" the property as a gift, free of any conditions. Section 165.110, RSMo 1949, as amended, provides that money donated to a school district be placed in the fund for which it was donated and accepted. Section 166.010, RSMo 1949, provides for the title of all schoolhouse sites to be vested in the school district. Although it is highly doubtful that the word "money" as used in Section 165.110, supra, could be expanded so as to include realty, this section is some evidence to show that a school district can be the recipient of a gift. Section 166.010, supra, states that the school district can hold property. Feeler v. Reorganized School Dist. No. 4 of Lincoln County, Mo. Sup., 290 S.W. 2d 102. A reasonable and necessary conclusion resulting from the combined perusal of these sections would be that the School District could accept a gift of land from the College

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to be used as the proposed high school location. This is not a violent conclusion in light of the fact that there is no statutory prohibition against receiving realty gifts, nor is there any violation of general public school principles by the acceptance of such a gift. The general proposition that a public or quasi-public corporation may take a devise or bequest under a will is found in Mississippi Valley Trust Co v. Ruhland 359 Mo 616, 222 SW 2d 750.

Your third question seeks to discover whether the School District can accept the land upon "the restriction that the board of education cooperate by permitting the college to carry on its practice teacher training, observations, and experience in connection with the public schools?" An opinion which helps greatly in the solution of the problem at hand is Board of Education of Louisville v. Society of Alumni of Louisville Male High School, 239 S. W. 2d 931. In this case the school board had been deeded certain real property with the provision, "that said property is to be used exclusively for the benefit of the Louisville Male High School and the white male pupils thereof." The Alumni Association of said high school was to have the right to enforce this covenant. After a school building had been built and after several years of using this building exclusively for boys, the Board of Education decided to use the building for co-educational instruction. The Kentucky court held that the covenant involved was invalid and unenforceable as against public policy. This conclusion was based upon the argument that the "covenant was an attempted ceding away of governmental powers by the School Board." Only the Board of Education, goes the opinion, could exercise the discretionary power in the management and control of the public schools under its jurisdiction. This discretion the court would not allow to be restricted by an enforcement of the covenant.

School districts in Missouri are separate legal entities referred to as "public corporations." Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S. W. 2d 930. These public corporations are used by the state to discharge the states' constitutional obligation of educating its youth. Art. IX, Sec. 1, Missouri Constitution, 1945. The legislature has given the respective boards of directors, or boards of education certain powers and duties. Section 163.010, RSMo 1949, as amended, gives the local school board the "power to make all needful rules and regulations for the organization, grading and government in their school district.***" The board has the power to "contract with and employ legally qualified teachers." Section 163.080, RSMo 1949. The "care and keeping of all property belonging to the district" is under the responsibility of the board, Section 166.030, RSMo 1949. In fact, Section 558.160, RSMo 1949, provides for fine and imprisonment for "neglect to perform any duty enjoined" upon the board members.

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The conclusion reached from the foregoing recitation of the statutory duties of the school board is to show that the school board alone has the discretion to determine whether laboratory teacher training is desirable for the School District. If so, how long is it to be employed? When may it be discontinued? How is it to operate? This discretion cannot be shackled by any contractual arrangement, nor may the school board dede away its governmental responsibilities of managing and controlling public schools and establishing general educational policies. Not only is the school board to exercise its duties and responsibilities unhampered by the above encumbrances, it is also inferentially required that the exercise of such duties is not to be unreasonably burdened by prior board decisions. As mentioned earlier the school board has the power to hire legally competent teachers. This power does not allow the employment of teachers for an unreasonable period of time -- the normal time being one year. Thus, a school board cannot bind their successors in office by a contract which unreasonably infringes upon their discretionary duties and powers to establish educational policies. A contract to engage in laboratory teacher training may only be made for a reasonable period of time and is not to irrevocably bind future school boards.

On April 26, 1939, this office rendered to the Honorable L. Cunningham, Jr., Prosecuting Attorney of Camden County, an opinion stating that a school district is not authorized to spend incidental funds for the purpose of repairing a public highway. This prior opinion is enclosed and sufficiently answers question number four.

CONCLUSION

It is the opinion of this office that R-2 School District of Nodaway County may acquire realty by purchase or by gift. In acquiring such property, however, the School District may not bind or restrict its discretion of determining and effectuating educational policy. Contractual arrangements made in this area may not be for an unreasonable period of time so as to hinder the exercise of discretion by future school boards.

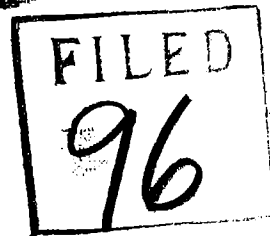
It is also the opinion of this office that a School District may not spend school funds to improve a public road leading to the proposed school site.

The foregoing opinion which I hereby approve, was prepared by my assistant Eugene G. Bushmann.

Yours very truly,

Thomas F. Eagleton
Attorney General

July 14, 1961



Mr. Joseph M. Whealen, Chairman
Jefferson County Republican Committee
Route #2, Box III
High Ridge, Missouri

In re: Martin Burgess

Dear Mr. Whealen:

I have your recent letter regarding Martin Burgess, Judge of the Jefferson County Court (First District).

In the case of State ex inf. vs. Burgess, 264 S.W.2d 339, Burgess was ousted from the office of Assessor as a result of a civil quo warranto proceeding. The allegation in this proceeding was that he violated provisions of Sec. 558.090 by soliciting a bribe. The judgment of the court was that he be ousted from office. No sentence was imposed upon him and, of course, none could be imposed in a civil quo warranto proceeding.

Sec. 558.130 disqualifies one from holding office who has been "convicted of any of the offenses mentioned in sections 558.010 to 558.120." The word "convicted" refers to criminal proceedings, not civil. The Supreme Court of Oregon, in discussing the meaning of the word "conviction" wrote as follows:

"The terms 'conviction' and 'punishment' each have a well-settled legal meaning, and are used in the law to designate certain stages and incidents of a criminal prosecution; and when the legislature declared that for a violation of his official duty a county treasurer should, on conviction thereof, be punished, it manifestly intended that the proceedings against him should be on the criminal, and not the civil, side of the court."

In the case of State vs. Madget, 297 SW 2d 416, where quo warranto was brought against a county judge alleging violations of Section 558.110 and in which case the judge was ousted from office, the court held that quo warranto is a civil proceeding and that the only object of such proceeding is to oust an individual from office or to declare that the office has been forfeited.

Mr. Joseph M. Whealen - 2.

July 14, 1961

In the present situation no question arises as to whether or not ouster from office can be based upon violations or acts committed by such officer in a previous term. In the cases of State vs. Mosley, 286 S.W.2d 721 and State vs. Wymore, 132 S.W.2d 979, the Supreme Court expressly reserved such question. However, in those cases the proceedings related to violations in previous terms and did not involve the question of a proceeding which had been begun and completed during a prior term.

In the case of State ex rel vs. Patten, 131 Mo. App. 628, the court held that a city treasurer could not be removed from office because of proof that previously, while holding the office of city collector, such person had embezzled monies from the city under a provision for removal "for cause shown." The court said that such person could not be removed "for cause shown" unless he had been "convicted" in a court of law of such embezzlement; therefore, even when there is a provision for removal of an officer "for cause shown," a conviction for a crime must be shown. In the present case there has been no conviction.

As previously pointed out, quo warranto is civil in nature and the only affect that can be given the successful prosecution of such a writ is to oust someone from exercising the franchise of office. It is obvious that such ouster is not a conviction of a crime. The ouster of Mr. Burgess in the quo warranto proceeding would certainly not have prevented the prosecuting attorney from prosecuting him under the provisions of Section 558.090, providing for a punishment upon conviction thereof by a sentence in the penitentiary for not exceeding five years. It follows, therefore, that if he could have been convicted for such crime the quo warranto finding would not have been a conviction because under the state and federal constitutions no person can be convicted twice for the same offense.

The court, in the Wymore case, supra, by holding that Wymore was ousted only from the remainder of his first term of office held that the effect of ouster in a quo warranto proceeding was not such fundamentally as to prohibit a person from holding office subsequent to removal by quo warranto, and since Mr. Burgess was not convicted of a violation of Section 558.090 he is not disqualified from holding the office of county judge under the provisions of Section 558.130.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

oh
cc: Hon. William B. Milfelt

JUNIOR COLLEGE DISTRICTS: (1) Public school districts presently operating a junior college are not junior districts within the meaning of the junior college district act. (2) public school district which is now offering a junior college course may be organized into a junior college district or may be included as one of the districts for the organization of a junior college district in two or more contiguous public school districts. (3) state board of education has full discretionary power to determine which petitions or proposals meet their standards for organization and which petitions or proposals will be submitted for a vote in those instances in which two or more petitions encompass a part of the same territory. (4) board of education of a public school district operating a junior college may discontinue or dissolve such junior college courses at their pleasure. A junior college district organized under the provisions of the junior college district act cannot force a discontinuance or dissolution of a junior college operated by a public school district so long as such junior college conforms to the scholastic standards established by the

(over)

November 9, 1961

Honorable Hubert Wheeler
Commissioner and Administrative Officer
State Board of Education
Jefferson Building
Jefferson City, Missouri



Dear Mr. Wheeler:

On October 20, 1961 you requested an opinion from this office concerning junior college districts in answer to the following questions:

"1. What is a 'junior college district' as defined in the junior college act, Sections 165.790 to 165.840, Laws of 1961? Would it include a public school district offering two-year college courses under Section 165.123, Laws enacted in 1927, and if such districts are junior college districts, would they have the power to levy taxes, issue bonds, etc., or, is reference made to such districts merely for the purpose of identifying them as regular public school districts that offer college courses?

"2. In the organization of junior college districts as defined by law, could a district that is now offering an approved two-year college course be included as one of the contiguous districts in the proposal for the formation of a new junior college district, or, could one district that now offers a two-year college course be formed into a junior college district under the provisions of the new junior college law?

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"3. When two or more petitions for the proposed organization of a 'junior college district' which include overlapping or conflicting territory are presented to the State Board of Education and each such proposed organization meets all of the required standards, would the State Board have full discretionary power to determine which proposal shall be given priority and submitted to the voters?

"4. Since the board of education of a public school district has discretionary power to offer two-year college courses, subject to the approval of the State Board of Education under Section 165.123, would the local board of education have the authority to discontinue or dissolve the junior college courses when such program is no longer needed or desired?

"Would the organization of a new 'junior college district' by including only one public school district that now offers two-year college courses, or by the annexation method in forming a junior college district, or by including one of the present public school districts that was offering two-year college courses on the effective date of this act, together with other adjacent districts, be equivalent to discontinuing or dissolution of the college courses offered under the provisions of the old law, Section 165.123?"

We will answer your questions in the order in which they are presented.

Senate Committee Substitute for Senate Bill No. 7 of the 71st General Assembly (Sections 165.790 to 165.840, RSMo, Laws 1961, pp. _____) does not specifically define a "junior college district". From a reading of the entire act, we understand a junior college district to be a public educational institution or school district organized in accordance with the provisions of sections 165.790 to 165.840, RSMo, Laws 1961, p. _____, and which provides instruction, classes and schools beyond a four year standard high school course in

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programs of not more than two years for pupils in the 13th and 14th year courses. This does not include private junior colleges, and we are concerned only with public institutions or districts. In answering your first question we first consider the laws relating to public junior colleges which were in effect prior to October 13, 1961, and which are as follows:

Section 165.123, RSMo 1959:

"Any public school district in this state which now has or hereafter may have a fully accredited high school may provide for two-year college courses in such schools, on the approval of and subject to the supervision of the state board of education."

Section 168.230, RSMo 1959:

"Whenever the board of education or board of directors of any school district of any city in this state that now has or may hereafter have a population of seventy-five thousand or more shall have established one or more city teacher-training schools for the purpose of training teachers for the elementary schools and shall have provided in such teacher-training school or schools at least a two-year professional course of instruction in advance of a four-year standard high school course, any such city school district shall be entitled to state aid as herein provided."

These sections provide for a junior college to be operated by a public school district. Such junior college is operated voluntarily---no such school district can be compelled to operate a junior college. The same school district and school board which operate the elementary and high schools in the district also operate the junior college. Establishment or discontinuance of the junior college has no effect on the existence of the local school district with respect to the operation of elementary and high schools. They are school districts which operate a junior college, and not "junior college districts" within the meaning of the junior college district act. There was no legal authority for the establishment or existence of a "junior college district" as a separate

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and autonomous school district, prior to the junior college district act. (Senate Committee Substitute for Senate Bill No. 7, 71st General Assembly, Sections 165.790 to 165.840, RSMo, Laws 1961, p. _____.)

Certain sections of the junior college district act would seem to indicate that there were junior college districts in existence prior to its enactment. Such language is found in Section 167.793 and Section 165.840, RSMo. The applicable language of these sections is as follows:

Section 165.793:

"1. Junior college districts formed prior to the effective date of sections 165.790 to 165.840 and those formed under the provisions of sections 165.790 to 165.840 shall be under the supervision of the state board of education."

Subsection (5) of Section 2 of Section 165.793:

"Supervise the junior college districts formed under the provisions of sections 165.790 to 165.840 and the junior college districts now in existence and formed prior to the effective date of sections 165.790 to 165.840;"

The only possible effect of the language of these sections referring to junior college districts formed prior to the effective date of this act or junior college districts already in existence is that if there are any such districts, they shall be under the supervision and control of the State Board of Education. It is our opinion that there are no "junior college districts" which were established or in existence as legal entities with taxing authority prior to the effective date of the junior college district act. There were only public school districts which operated a junior college. The language of the statutes referred to above concerning junior college districts established or in existence prior to the effective date of the junior college district act is completely ineffectual for the purpose of making such junior colleges into junior college districts. It was probably inserted to guarantee that any junior college operated by a public school district in Missouri would be under the direction and control and supervision of the State Board of Education.

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Other provisions of the junior college district act which implement the supervision of the State Board of Education over such colleges are sections 13 and 15 of Senate Bill No. 7, (Sections 165.830 and 165.837.) Section 13 of Senate Bill No. 7, (Section 165.830) refers to school districts offering two-year college courses under Section 165.123 RSMo, and provides that they shall be entitled to receive state aid if they meet all the standards established by the State Board of Education. Section 15 of Senate Bill No. 7, (Section 165.837) is interrelated with this section in that it provides that if a school district operating a junior college has refused, without good cause, to honor a petition for annexation for junior college purposes by an adjoining school district, the State Board of Education may hold a hearing and withhold payment of state aid to the offending school district for its junior college. This is another specific implementation of the supervision of the State Board of Education over existing junior colleges operated by school districts in the State of Missouri.

The specific placement of these colleges under the supervision of the State Board of Education and the specific provisions applicable to them to implement the supervisory authority of the State Board of Education over such colleges belies any intent of the legislature to make such junior colleges into a junior college district within the meaning of the junior college district act. If they had been automatically made into a junior college district, there would be no need for these special provisions applicable to the existing junior colleges.

Nowhere in the junior college district act or in any other law does it say that a school district offering a two-year college course is specifically designated a Junior College District. Under the junior college district act, there are specific provisions for a petition and an election at which the proposition of the establishment of a junior college district is presented to the people. At this election, the trustees of the junior college district are also elected. Section 165.797 states that "such junior college district shall be in addition to any common, city, town, consolidated, re-organized, special or other school districts existing in any portion of such area."

The junior college district act does not specifically designate or change a junior college operated by a public school district into a junior college district. If the

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legislature had intended such a change to be made, it could have very easily said so in plain words. The two references in the act to "junior college districts (now in existence and) formed prior to the effective date of the act" are effective only for giving the State Board of Education supervision over all public junior colleges. Other provisions of the act refer to "school districts offering two-year college courses under section 165.123, RSMo" and make special provisions for such districts with respect to receiving state aid, annexation of adjoining districts to such district for junior college purposes only and thereby forming a junior college district, and the further provision is made that no such district may be dissolved except as now provided by law.

All of these provisions are convincing evidence that the legislature did not intend to transform public school districts which operate a junior college into junior college districts.

For the reasons presented, in answer to your first question, we conclude that public school districts presently operating a junior college under authority of Section 165.123 or Section 168.230, RSMo 1959, are not "junior college districts" within the meaning of that term as used in Senate Committee Substitute for Senate Bill No. 7 (Sections 165.790 to 165.840, RSMo, Laws 1961, p. _____).

Your second question concerns the inclusion of a school district presently operating a junior college in a petition or proposal to form a junior college district.

Section 1 of Senate Bill No. 7, (Section 165.790,) states that a junior college district may be established. It states that in any public school district or in any two or more contiguous public school districts in the state, the voters therein may establish a junior college district in the manner specified in Senate Committee Substitute for Senate Bill No. 7 by presenting a petition. The language of this section in saying that a junior college district may be established in any public school district is all inclusive. It includes every public school district in the state regardless of whether the school district is a common, city, town, consolidated, reorganized, special or other school district and regardless of whether the school district is presently operating a junior college. Any public school district now existing in the State of Missouri which operates a two-year college course is included in this phrase of "any public school district." There is no language in any other part of the act which would exclude them.

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In answer to your first question we concluded that school districts which operate a junior college are not junior college districts. Such districts are not expressly excluded from the application of the provisions of the junior college district act for the establishment of a junior college district. Since they are not excluded from such provisions, they are included in them. At no place in the junior college district act are such school districts prohibited from establishing a junior college district. Since they are not prohibited from so doing, they are permitted to establish a junior college district the same as any other public school district.

We therefore conclude in answer to your second question that a public school district which is now offering a junior college course may present a petition or proposal to form a junior college district therein, or may be included in a petition or proposal as one of the contiguous districts for the formation of a junior college district.

Your third question concerns the problem of two or more petitions or proposals for the formation of junior college districts which overlap or include a part or all of the same territory in each petition.

The applicable portion of the junior college district act is Section 165.800. This section provides that when a petition signed by 5 percent of the voters is presented to the State Board of Education praying that a junior college district be organized, the State Board of Education shall order an election. The only prerequisite is that the State Board of Education determine that the area proposed to be included within said district meets the standards established by the State Board of Education for organization. The word "shall" is mandatory and the State Board of Education would have to order an election for each petition presented provided that the petition met the standards of the Board of Education for organization. Any discretion of the Board of Education in ordering an election hinges upon a determination of whether the petition meets the standards for organization. The State Board of Education has not yet established such standards. These standards must be established prior to the organization of any district. This is required by Section 165.790. Under this same section the standards established by the State Board of Education shall include, among other things, three specific requirements which are: whether a junior college is needed, whether the assessed valuation is sufficient to support the college and whether there were a sufficient number of high

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school graduates to support the college. These three things must be included in the standards, but they are not exclusive. The State Board of Education may make any other reasonable requirement in its standards for organization which it may deem advisable. The State Board of Education may make some reasonable standards concerning the priority of petitions for the establishment of junior college districts which include the same territory in two different petitions, and particularly in determining whether a junior college is needed. In establishing these standards, the language of Section 2 of Senate Bill No. 7, (Section 165.793) is helpful as a guide. This section refers to the duties of the State Board of Education. Of particular application in this instance is paragraph 2 of Section 2 of Section 165.793 which makes it a duty of the State Board of Education to:

"(2) Set up a survey form to be used for local surveys of need and potential for two-year colleges; provide supervision in the conducting of surveys; require that the results of the studies be used in reviewing applications for approval; and to establish and use the survey results to set up priorities;"

It would therefore seem apparent that the standards for organization established by the State Board of Education should contain a requirement that the survey referred to be made, that the results thereof be used in reviewing applications, petitions and proposals for approval; that the State Board of Education may determine priorities between two or more petitions or proposals which encompass a part or all of the same territory; and that the State Board of Education, in the exercise of its discretion, may approve or disapprove any application, petition or proposal in accordance with what it determines to be the need in such proposed district and in the best interests of the districts involved, when such territorial overlapping occurs.

Accordingly, in answer to your third question, it is our opinion that the state board of education would have full discretionary power to determine which petition or proposal had met the standards for organization established by the State Board of Education, and consequently could determine which proposition would be submitted to the voters in those instances in which two or more petitions encompass a part or all of the same territory.

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The fourth question concerns the effect of the junior college districts act on present public junior colleges.

By Section 165.840 public school districts operating a junior college are under the supervision of the State Board of Education and they shall conform to the scholastic standards established by the board. Such colleges were already under the supervision of the State Board of Education by the terms of the statutes under which they were established and are operated. This section makes a further provision that they must conform to the scholastic standards established by the State Board of Education. If such a junior college did not conform to the junior college district scholastic standards, it is presumed that the State Board of Education could dissolve or discontinue such a junior college for such noncompliance since the junior college is under the supervision of the State Board of Education.

Section 165.830 provides that school districts offering two-year college courses under Section 165.123, RSMo, are entitled to receive state aid (\$200.00 for each 30 semester hours of college credit) the same as junior college districts organized under the junior college district act, provided that the school districts offering two-year college courses meet the standards established by the State Board of Education for junior college districts. A granting of state aid only on condition that the standards are met is an additional tool given to the State Board of Education for use in their supervision of the junior colleges operated by public school districts.

Section 165.840 provides that the junior colleges operated by a public school district shall conform to the scholastic standards established by the State Board of Education, but it further provides that "no such district may be dissolved except as now provided by law and in no instance because it does not meet the standards for organization established by the State Board of Education under the provisions of Section 165.790." This simply means that while the State Board of Education has supervision over the junior college, it cannot dissolve or disband the public school district as such. This section gives the State Board of Education supervision over the junior college only. It does not give the State Board of Education any power or authority to dissolve the school district or to interfere with the operation of elementary and high schools by the district. Such a district can be dissolved only in the manner now provided by law for any other school districts of the same kind or class.

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Section 165.837 may have some effect on junior colleges presently operated by public school districts. This section provides that an adjoining school district may annex, for junior college purposes only, to a school district offering a two-year college course under Section 165.123, RSMo 1959 on October 13, 1961, and receiving aid under subsections 1 and 2 of Section 165.830. This annexation shall be in accordance with the provisions of Section 165.300 which requires a petition by ten voters to be presented in the district seeking to annex; a special election; and a majority vote in favor of annexation. The school board of the receiving district which is operating the junior college then determines if they want to accept the annexation. If the annexation is approved, a special junior college district is formed of the entire territory and the effect upon the junior college operated by the public school district would be the same as if a junior college district had been formed by a petition and election under Section 165.800. If the annexation is refused by the board of the receiving school district which operates the junior college, there are provisions in this section for a hearing before the State Board of Education which may in its discretion withhold a portion or all of the state aid from said district which is payable under Section 165.830 if the State Board of Education finds that refusal to honor the petition for annexation was made without good cause. The net effect of this section is to provide an additional method of forming a junior college district and to provide the State Board of Education with an additional tool in their supervision of junior colleges in the form of economic pressure by the refusal of state aid for a junior college operated by a public school district under these conditions.

Your question is intricately involved with the problem of what happens to a junior college operated by a public school district when a junior college district is formed. Section 165.123 is still in effect and is still authority for a public school district to operate a junior college. This is true regardless of whether or not a junior college district is organized. However, the junior college operated by the public school district must conform to the scholastic standards established by the State Board of Education and this is true regardless of whether or not a junior college district is organized. We therefore conclude that the organization of a junior college district in a public school district which operates a junior college does not in and of itself discontinue or dissolve the junior college or college courses offered by the public school district under the provisions of Section 165.123. The provisions of Section 165.123 are permissible.

Honorable Hubert Wheeler

They are not compulsory. Since they are permissible and not compulsory, a public school district may operate a junior college or may discontinue the operation of the junior college at its pleasure. If the board of a public school district desires to continue the operation of a junior college in such district under the provisions of Section 165.123, the State Board of Education cannot force the dissolution of such junior college so long as the public school district operating the junior college conforms to the standards established by the State Board of Education. It is therefore legally possible to have two junior colleges in operation in the same school district; one operated by the public school district and the other operated by a junior college district organized under the provisions of the junior college district act. It should be noted here that if a junior college district is formed under the junior college district act, such junior college district must operate a junior college because of the provisions of Section 165.817 which require that a junior college district "shall provide instruction, classes, school or schools for pupils resident within the junior college district who have completed an approved high school course."

We are of the opinion that a junior college district cannot force the dissolution of a junior college operated by a public school district and cannot take over such junior college contrary to its will. However, we feel that the provisions of the junior college district act are designed to facilitate the acquisition or taking over of the junior college by the junior college district. This intention is expressed by Section 165.833 which makes provision for a school district to lease, sell or convey property suitable for junior college purposes to an institution of higher education such as the junior college district.

In answer to your fourth question, we conclude that the Board of Education of a public school district operating a junior college under the provisions of Section 165.123 may discontinue or dissolve such junior college courses at any time they desire. We further conclude that a junior college district organized under the provisions of the junior college district act cannot force the discontinuance or dissolution of a junior college operated by a public school district so long as such junior college conforms to the standards established by the State Board of Education, but that the junior college district act is designed and intended to facilitate the transfer of the operation of such junior colleges from the public school district to the junior college district organized under the provisions of the junior college district act.

Honorable Hubert Wheeler

CONCLUSION

It is therefore the opinion of this office as follows:

1. Public school districts presently operating a junior college are not junior college districts within the meaning of the junior college district act.

2. A public school district which is now offering a junior college course may be organized into a junior college district or may be included as one of the districts for the organization of a junior college district in two or more contiguous public school districts.

3. The state board of education has full discretionary power to determine which petitions or proposals meet their standards for organization and which petitions or proposals will be submitted for a vote in those instances in which two or more petitions encompass a part of the same territory.

4. The board of education of a public school district operating a junior college may discontinue or dissolve such junior college courses at their pleasure. A junior college district organized under the provisions of the junior college district act cannot force a discontinuance or dissolution of a junior college operated by a public school district so long as such junior college conforms to the scholastic standards established by the state board of education. The junior college district act is intended to facilitate the transfer of junior colleges operated by public school districts to a junior college district organized under the provisions of the junior college district act.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Very truly yours,

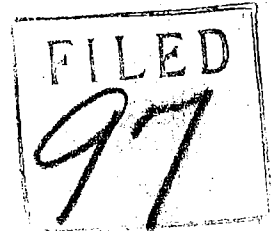
THOMAS F. EAGLETON
Attorney General

WWW:aa

MAGISTRATES:

Salary of magistrates governed by Section 482.150.

January 3, 1961



Honorable Robert P. G. Wilson, III
Prosecuting Attorney, Platte County
Platte City, Missouri

Dear Mr. Wilson:

In your letter of December 8, 1960, you submit a question relative to Section 482.090, RSMo 1949, as follows:

"Platte County, Missouri now has within its boundary a part of a city of more than four hundred thousand inhabitants. The above mentioned statute seems to vest the Magistrate Court of Platte County, Missouri with jurisdiction in civil actions when the sum demanded, exclusive of interest and costs does not exceed two thousand dollars. I would like to have the opinion of your office as to whether the Magistrate of Platte County, Missouri is entitled to receive the same salary as other Magistrates who have two thousand dollar jurisdiction."

Section 482.090, RSMo, 1949, as amended, Laws of Missouri, 1959, S. B. No. 173, V.A.M.S., pocket parts, defines the jurisdiction of the magistrate courts according to the type of cases and monetary amount involved based on the population of the county or the fact that a county contains a city or part of a city of a designated population.

Section 482.150, V.A.M.S., pocket parts, (Laws 1959, H. B. 150) provides for the salaries of magistrates based on population or population and assessed valuation of the county involved.

Honorable Robert Wilson

In Ward v. Christian County, 111 SW 2d, 182, 1.c. 183 (Mo. Sup.) the Court made the following statement:

"It is well settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed."

It is a cardinal rule of law that no public officer is entitled to compensation unless provided for by statute and the law conferring such right must be strictly construed against the officer and cannot be implied. Statutes providing compensation in a particular mode or manner must be strictly construed against the officer.

Section 482.090, supra, is limited to matters concerning the jurisdiction of the court and has nothing to do with the salary and should not be considered in determining the salary of the magistrate of the court. The compensation a magistrate is to receive is governed entirely by Section 482.150, supra.

CONCLUSION

It is our opinion the compensation a magistrate is to receive is governed by Section 482.150, V.A.M.S., supra, without considering the provisions of Section 482.090 V.A.M.S., supra, relating to jurisdiction of magistrate courts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

JOHN M. DALTON
Attorney General

RM:ms

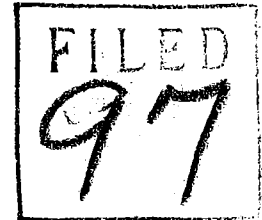
PHARMACISTS: Pharmacists are not exempt from the application of the Missouri Economics Poisons Act.

ECONOMIC POISONS: Definition of "economic poisons" is limited by its intended use; by the definition of the terms insects, fungi and weeds; and by the commissioner declaring them to be pests.

DEFINITION:

January 25, 1961

Honorable Norman J. Williams
Prosecuting Attorney
Miller County
Tuscumbia, Missouri



Dear Sir:

This is in response to a letter of December 1, 1960, from your predecessor in office, Honorable LeRoy Snodgrass, which we quote as follows:

"It has been called to the attention of this office that several pharmacists have been dispensing or selling to the general public in bulk form, not under original package and labels, not only for human consumption, but for uses as repelling, destroying, or mitigating any insects, etc., as defined in Section 263.270, apparent economic poisons.

"Some of the chemicals, compounds, or concoctions are as follows: Oil of Citronella, plain sulphur, copper sulfate, sometimes called Blue Vitriol or Blue Stone, iron sulfate, sometimes called copperas, tincture of larkspur, and others.

"Apparently they are doing so under the opinion that Section 338.010 authorizes them to so do, upon the theory that such are ordinary household remedies or normally sold by general merchants.

"Will you please furnish this office with an opinion as to whether or not the pharmacists are in violation of the above sections in so doing, or are in violation of any other laws of this state."

Honorable Norman J. Williams

Section 338.010, V.A.M.S., provides:

"It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter 338.010 to 338.190 to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the direct supervision of a person licensed as a pharmacist under this chapter 338.010 to 338.190. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist to compound, dispense, or sell at retail, any drug, medicine or poison, except as an aid to or under the direct supervision of a person licensed as a pharmacist; provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes; provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, and the ordinary household remedies and such drugs or medicines as are normally sold by those engaged in the sale of general merchandise; provided further, that nothing in this section shall be so construed as to prevent any person, firm, or corporation from owning a pharmacy, drug or chemical store or apothecary shop, providing such pharmacy,

Honorable Norman J. Williams

drug or chemical store or apothecary shop
shall be in charge of a licensed pharmacist."
(Emphasis supplied.)

We quote the following part of Section 263.280, V.A.M.S.:

"1. It shall be unlawful for any person to distribute, sell, or offer for sale within this state, or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

(1) Any economic poison which has not been registered pursuant to the provisions of section 263.300, or any economic poison if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs from its composition as represented in connection with its registration; provided, that in the discretion of the commissioner, a change in the labeling or formula of an economic poison may be made within a registration period without requiring re-registration of the product;

* * * *

In considering the primary problem which your letter seems to raise, we would draw your attention to those portions of the pharmacy law and the economic poison law which we have quoted above. You will note from the economic poison law that it is unlawful for any person to sell within this state poisons under the circumstances as set forth in the balance of Section 263.280. The significant words to note are "any person." This would obviously include registered pharmacists unless they are exempted from the applicability of the economic poison law by some other law.

In looking to Section 338.010, supra, we note that it becomes unlawful for any person not licensed as a pharmacist to dispense drugs, etc., in violation of Section 338.010. However, this same section provides that it shall not be construed to interfere with the sale of poisonous substances which are sold

Honorable Norman J. Williams

exclusively for use in the arts or for use as insecticides, when such substances are sold in unbroken packages bearing a label with the name of the contents printed thereon and the word "poison," with the names of at least two readily obtainable antidotes. Therefore, reading Section 338.010 by itself, it would seem that any person, including pharmacists, if there were no other applicable statute, could sell those poisonous substances for use in the arts, etc. But it cannot be said that Section 380.010 exempts pharmacists from the application of Section 263.280 or any of the other sections of the Missouri Economics Poisons Act. It is well-established law that unless two sections of the law are entirely inconsistent and repugnant, they must be read together and both given force and effect. This law is generally set forth again in the case of State v. Ludwig, 322 SW2d 841, page 848. The court therein states essentially that where two acts are seemingly repugnant they must, if possible, be so construed so that the latter may not operate as a repeal of the earlier one by implication. If they are not irreconcilably inconsistent, they both must stand.

It is difficult for this office to see any inconsistency between the sections of the Missouri Economics Poisons Act and Section 338.010 of the pharmacy law. In the event that a pharmacist wishes to sell an economic poison, he must do so in compliance with the Missouri Economics Poisons Act.

In reply to what would appear to be a secondary question in your letter, we are enclosing copy of an opinion written to L. C. Carpenter, Commissioner of Agriculture, dated December 5, 1955. You will see that this opinion restates the basis for a definition of an economic poison, and we feel that this may be used in conjunction with the definition of economic poisons set forth in Section 263.270, V.A.M.S., to determine whether a specific chemical or compound or concoction is an economic poison. The term "insect" is defined in subparagraph (7) of that section, the term "fungi" is defined in subparagraph (8), and the term "weed" is defined in subparagraph (9) of that section. These definitions should be considered in conjunction with the limitations contained in the definition of "economic poison." In Section 263.270(1), V.A.M.S., the term "economic poison" is defined to mean substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, etc., . . . , "which the commissioner, after a hearing, shall declare to be a pest." Thus, there are three limitations in the definition of economic poison. One is in the definition of the

Honorable Norman J. Williams

terms "insect," "fungi," and "weed," another in the use of the substance as intended for the stated purposes, and another is in the declaration by the commissioner of the specified insects, rodents, fungi, weeds, etc., to be pests.

Conclusion.

It is the opinion of this office that Section 338.010, V.A.M.S., 1960, does not exempt pharmacists from the application of the Missouri Economics Poisons Act, and therefore any economic poison sold by a pharmacist or by any other person not specifically exempted by the Economics Poisons Act would have to comply with that act.

The definition of "economic poison" is limited by the intended use of the substance, by the definitions of the terms "insects," "fungi," and "weeds," and by the declaration of the commissioner of the specified insects, rodents, fungi, weeds, etc., to be pests.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WWW:ml

Enc.

HIGHWAYS:
MOTOR VEHICLES:
SPEEDING, CARELESS AND
IMPRUDENT DRIVING:

Drivers using completed, but as yet
unopened portions of a highway may
be prosecuted for speeding or care-
less and imprudent driving.

February 24, 1961



Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Wilson:

This is in reply to your letter of January 4, 1961, requesting an opinion as to whether persons using a highway which had been completed as to its construction, but which as yet was unopened for public use, are subject to prosecution under our criminal statutes for driving violations such as speeding. Your inquiry reads:

"I respectfully request the opinion of your office on the following question. New Interstate Highway 29 is presently under construction through Platte County, Missouri. Some portions of it have been opened for use by the general public, and some portions have not been so opened. There have been instances of speeding and careless and imprudent driving on those portions of Interstate 29 not opened for use by the general public. The question is whether our criminal statutes would apply to such instances."

There is no statutory charge as such of "careless and imprudent driving", but rather it is a violation of the statutory requirements imposed by Section 304.010 RSMo 1957 Cum. Supp. that operators of motor vehicles "shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life and limb of any person". A violation of this provision in Section 304.010, supra, can

Honorable Robert P. C. Wilson, III

support a charge of careless and imprudent driving where there is sufficient evidence of such a law violation through violation of the speeding provisions of Section 304.010, supra, or through violations of the other provisions of Chapter 304 RSMo which establish the proper standards of vehicle operation on our highways.

For an excellent discussion of the rule governing this charge see either *State v. Ball*, Missouri Appeals, 171 S.W. 2d 787 or *State v. Reynolds*, Missouri Appeals 274 S.W. 2d 514.

We therefore assume that your inquiry pertains to violations of the provisions of Chapter 304, supra, and in particular to Section 304.010, supra. Section 304.010, supra, as amended reads:

"1. Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person.

"2. Except as otherwise provided by law no vehicle shall be operated in excess of

(1) Seventy miles per hour on any divided federal highway or, when lighted lamps are not required by law, on any other federal highway;

(2) Sixty-five miles per hour on any other road or highway in the state when lighted lamps are not required by law;

(3) Sixty-five miles per hour on any undivided federal highway when lighted lamps are required by law;

(4) Sixty miles per hour on any other road or highway in the state when lighted lamps are required by law.

"3. In any city, town or village where the speed limit is not set by local authority, no vehicle shall be operated at a speed in excess of forty-five miles per hour. All

Honorable Robert P. C. Wilson, III

ordinances of cities, towns or villages, regulating the speed of vehicles on major state highways shall be designed to expedite the flow of traffic thereon to the extent consistent with public safety.

"4. The limits on speeds set by this section do not apply to the operation of any emergency vehicle as defined in section 304.022. Nothing in subsections 2 and 3 shall make the speeds prescribed therein lawful in a situation that requires lower speed for compliance with the basic rule declared in subsection 1.

"5. Any person violating this section is guilty of a misdemeanor.

"6. Violation of the provisions of sections 304.010 and 304.011, specifying speed limitations shall not be construed to relieve the parties in any civil action or any claim or counterclaim from the burden of proving negligence or contributory negligence as the proximate cause of an accident or as the defense to a negligence action."

Note that Section 304.010, supra, Paragraph 1, requires that violations of that section be occasions through the operation of a motor vehicle "on the highways of this state". This phrase is clarified somewhat as to the instant situation by the definition given to the term "highway" in Section 304.025 RSMo Cum. Supp. 1957, which section reads in part:

"2. The word 'highway' whenever used in sections 304.014 to 304.026 shall mean any public road or thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality."

This definition would seem at first glance to indicate that the as yet officially unopened highway was not sufficiently opened to the public to constitute a "highway" within the meaning of Section 304.010 and Section 304.025, supra. There are no Missouri

Honorable Robert P. C. Wilson, III

cases directly concerning the question of completed but as yet unopened highways which are in use by certain segments of the public. It is our view that we must look to the evident intent of the legislature to determine whether the purpose of the statute or the evil sought to be remedied would be thwarted by a literal interpretation of the definition given in Section 304.025, supra. In a prior Missouri Case, Phillips v. Hinson 326 Mo. 282 30 S.W. 2d 1065, our Supreme Court had occasion to consider a statute defining the term "highway" in almost the same language as the quoted definition of the term given in the present Section 304.025, supra. It was determined in that case that the purpose of the predecessor statute to Section 304.010, supra, and the other provisions of Chapter 304, supra, governing the operation of motor vehicles on our highways are for the safety of the public, to protect lives and as such should not be narrowly construed, the court discussed the meaning of the word "highway" as follows 30 SW 2d 1.c.1068:

"The statute requires that every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person. Section 19, p. 91, Laws of Missouri 1921 (First Extra Session). Section 3 of the same act defines the word 'highway' as 'any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality.' Defendant's contention on this point is that the statute requiring persons driving motor vehicles on the highways of this state has no application to this case, because there was no evidence that the street on which defendant was driving his truck was a public highway.

"The evident purpose of the Legislature in enacting this statute was to protect the lives and property of persons while on or using the roads of this state where the public are accustomed to travel. It would be giving the statute a strained and narrow construction to hold that the Legislature did not intend to protect the

Honorable Robert P. C. Wilson, III

lives and property of persons on or using a highway continuously traveled by the public generally, unless such highway had been legally established by constituted authority or by user for the statutory period of time. Keeping in mind the purpose of the statute, it is reasonable to conclude that the word 'highways' was used in the statute in its popular rather than its technical sense, and was intended to include all highways traveled by the public, regardless of their legal status." (Emphasis ours.)

Views substantially similar to the quoted portion of the court's opinion in Phillips v. Hinson, supra, have been frequently expressed by our courts in situations involving protection of the motoring public. See in this regard Crocker v. Jett, Missouri Appeals 93 S.W. 2d 74, 76; Kelley v. Lahey, Missouri Appeals 232 S.W. 2d 177, 181; Koff v. Senter, Missouri Appeals 317 S.W. 2d 666, 671.

Courts of other states have considered factual situations in which the public has used a highway not officially opened and has determined that there was tort liability in such situations. In these cases it was determined that the rules of the road enacted in the statute were for the protection of the public and they are not to be narrowly construed. To better understand these cases let us briefly consider the facts and circumstances surrounding each of them.

In Savoie v. Littleton Construction Company 95 New Hampshire 67, 57 Atlantic 2d 772, the contractor permitted travel on a highway before construction was completed though there were barricades erected. One of the barricades had been partially opened to allow the contractors trucks to enter and leave. The court held that the contractor was liable in tort, and that it was bound to conduct operations as though the highway was open and so held that the rules of the road applied.

Likewise in Beasley v. O'Connor Inc., 163 Nebraska 565 80 N. W. 2d 711, the court in similar circumstances found liability in tort. There were no barricades erected, but construction signs were erected with warnings not to drive on the highway. The court again held that the rules of the road were applicable to persons using the highway.

Honorable Robert P. C. Wilson, III

Also in conformity with the holdings in the above mentioned cases and in a similar factual situation is *Pestotnik v. Balliet* 233 Iowa, 1047 10 N.W. 2d 99, wherein the plaintiffs were driving on a newly paved cutoff which avoided a city and though as not yet opened there were no closed signs, but only construction warning signs in the vicinity. Again the court indicated that the rules of the road applied.

On the basis of the foregoing cases it is our view that Section 304.010, supra and the other statutes constituting the rules of the road for the operation of motor vehicles on the highways of the state as found in Chapter 304 RSMo, should be given a liberal interpretation to promote the evident purpose of those statutes. In enacting these laws, the legislature had in mind the protection of the motoring public and with such an objective the evident purpose of the enactment, it logically follows that those using a highway which is as yet unopened to the public should observe the rules of the road or they may be prosecuted for violations taking place on this portion of the highway as on any portion officially opened to the public.

CONCLUSION

Therefore, it is the opinion of this office that drivers using the completed portion of a highway which is as yet officially unopened, but being used by the public, may be prosecuted for speeding or careless and imprudent driving.

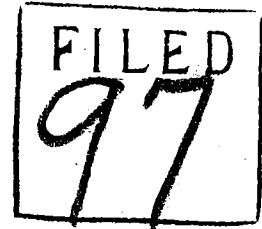
This opinion was prepared by my assistant Jerry B. Buxton.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JEB:aa

July 21, 1961



Honorable Paul E. Williams
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Paul:

You have written to us concerning an interpretation of Sec. 369.390, RSMo 1959. As we understand the situation the facts are as follows. A savings and loan association makes a loan (first mortgage) to an individual with the knowledge that subsequent to this loan a second mortgage loan will be made by a member of the board of directors of the savings and loan association to the individual. Later the loan is refinanced by a first deed of trust taken by the association when it makes a loan to pay off both its original loan and the loan made by the director.

Sec. 369.390, RSMo 1959 reads as follows: LOANS TO DIRECTORS AND OFFICERS FORBIDDEN - EXCEPTIONS

"1. No real estate loan shall be made to a director or officer or to a partnership or firm in which a director or officer is interested, or to a corporation of which a director or officer of the association is a director, officer, stockholder or creditor or upon real estate in which any director or officer has an interest as mortgagee; provided, however, that a real estate loan may be made to a director or officer upon the security of a first mortgage or deed of trust upon the single family residence or homestead of such director or officer where such loan has first been approved in writing by a two-thirds majority of the board of directors and a copy of such written approval has been recorded in the minutes of the board of directors.

2. The provisions of this section shall not be applicable to a loan to be guaranteed under the Servicemen's Readjustment Act of 1944, or to a loan which has been insured by the Federal Housing Administrator."

Honorable Paul E. Williams -

2.

July 21, 1961

Under this section and the facts as set forth above, we make the following observations.

(1) There is no violation of Sec. 369.390 when the association makes a loan and the director later on makes a loan and takes a second deed of trust, but where it is agreed in advance to do this, it probably violates the intent of the statute even though not the letter thereof.

(2) There is a violation of Sec. 369.390 when the refinancing takes place, because in that situation the director is a mortgagee and the making of a loan by the association in such a situation is prohibited by Sec. 369.390.

(3) I find no criminal statutory authority under which the Prosecuting Attorney could commence a criminal proceeding under these circumstances.

(4) Under Sec. 369.515 the Supervisor of the Savings and Loan Division could take action.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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ASSESSMENTS:

**TANGIBLE PERSONAL
PROPERTY:**

ASSESSOR'S DUTIES:

FIRST CLASS COUNTIES:

1. Upon failure of taxpayer to file assessment list of all tangible taxable personal property within time and manner required by applicable statutes, Sec. 137.345, RSMo 1959, requires assessor of first class county to assess property which should have been listed at double value. He may rely solely upon next or last preceding list filed by taxpayer as to property and its value if it is best information obtainable. 2. For each subsequent year assessor determines a penalty is due he shall list property at double value shown on next or last preceding list of taxpayer, but is unauthorized to redouble value of property for each subsequent year he prepares a list. In no case may be assess property at more than double its value.

November 3, 1961

Honorable John A. Williams, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Williams:

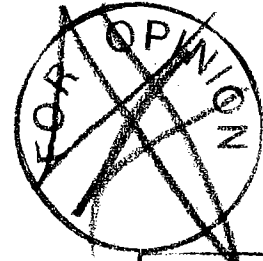
This office is in receipt of your request for a legal opinion, which reads as follows:

"May the assessor of a first class county currently employ as his sole source of information the itemized personal property statement rendered by the taxpayer during and for the next preceding year to determine the property which should have been listed and double same as provided by Section 137.145, R. S. Mo. 1959?

"Provided the answer is yes may this same information be used and redoubled each subsequent year the taxpayer fails to file his personal property return?"

Section 137.145, RSMo 1959, is referred to in the first inquiry of your opinion request. Evidently this is not the section intended as Section 137.345, RSMo 1959, is the one authorizing an assessor of a first class county to make an assessment when the taxpayer fails or refuses to file a list or statement of all taxable tangible personal property owned or controlled by him during the year, and permits the assessor to double the value of the property which should have been listed by such taxpayer. For the purpose of our discussion herein, we shall treat the first inquiry as referring to Section 137.345 and not to Section 137.145, RSMo 1959.

Section 137.340, RSMo 1959, is applicable to counties of the first class and in effect provides every person, corporation, partnership or association subject to taxation under the laws of this state, owning or controlling taxable tangible personal property, except merchants, manufacturers, railroads, public utility and pipeline companies or any other person or corporation subject



Honorable John A. Williams

to special tax requirements, shall file an itemized tax return listing all tangible personal property owned or controlled by the taxpayer on the first day of January each year, which property shall be estimated at its value in money. The list shall be delivered to the assessor between the first day of January and the first day of March each year, and shall be signed and certified as to the truth of the contents by the taxpayer.

It will be assumed the taxpayer referred to in the opinion request is an individual and is not one coming within any of the exceptions, or one subject to taxation under special statutory provisions, consequently the taxpayer referred to in said opinion request has the duty of filing an itemized list, with the estimated value of each article listed, properly certified by him and filed with the assessor within the time provided by Section 137.340, each year.

Section 137.345, RSMo 1959, requires the assessor of a first class county to prepare an assessment list when none is filed by the taxpayer and reads as follows:

"1. If any person, corporation, partnership or association neglects or refuses to deliver an itemized statement or list of all the taxable tangible personal property signed and certified by the taxpayer, the assessor shall assess the property which should have been listed at double its value. The assessor may omit assessing the penalty in any case where he is satisfied that the failure to file the list was due to illness or was unavoidable and not willful.

"2. The assessor, in the absence of the owner failing to deliver a required list of property is not required to furnish to the owner a duplicate of the assessment as made."

The above quoted section does not specify any procedure to be followed by the assessor in obtaining information as to what property is to be listed and the estimated value in money of each piece of property. In the absence of any such statutory provisions, it is believed this matter has been left to the sound discretion of the assessor, who is authorized to use any or all lawful means available to him in obtaining the best, or most reliable information possible under the circumstances.

Honorable John A. Williams

Section 137.130, RSMo 1959, requires the assessor to make a list of a taxpayer's property when the latter fails to return a list. This is a general statute applicable to all counties in the state, and since it is on the same general subject as Section 137.345, supra, both are in pari materia and must be harmonized, with a view to giving effect to both.

Section 137.130, RSMo 1959, reads as follows:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

Said section refers to any taxable property in any county where no list has been given to the assessor in the proper time and manner and is applicable to counties of the first class.

While the making of an assessment list upon the assessor's own view would undoubtedly be the best and most reliable way in which he could obtain the necessary information, it is not always possible to do this. In a first class county where the assessor may be required to fill out assessment lists for numerous taxpayers who do not file any, it would be very difficult, if not impossible, and certainly impractical, for the assessor to attempt to personally view the property of each individual taxpayer, or to attempt to examine all such taxpayers under oath before completing the assessment lists.

In this or similar instances when a personal view cannot be had, the assessor is authorized by Section 137.130, supra, to make out the list upon the best information he can obtain. The section does not indicate what information shall be the best obtainable within the meaning of the section, or what methods or sources of information the assessor is to make use of in his investigation. In the absence of any such statutory provisions, it appears that the determination of the best information obtainable, the sources of same, as well as the methods to be used,

Honorable John A. Williams

have been left to the sound discretion of the assessor.

One reliable source of information available to the assessor would be the assessment lists filed by the taxpayers for the next preceding year, or for the last year they did file lists.

Ordinarily such prior years' list will afford reliable, if not the only source of information available to the assessor. The reasons for the reliability of same are quite obvious, when it is remembered that the taxpayer is surely in a better position than anyone else to know what property he owned or controlled during the current tax year, and to make a fair estimate of its value. The property shown on the list must be certified to by him as being a true and correct statement of his property.

Although the next preceding or last prior year's assessment lists may have correctly listed the taxpayer's property when filed, such lists may no longer contain accurate statements as to the property and its value owned or controlled during the current year, and from which the assessor makes lists upon the taxpayers failure or refusal to do so. Such property may have long since increased or decreased in value and the taxpayer might own or control only a portion, or none of the property last reported by him, and the list prepared by the assessor may not actually reflect the status of the taxpayer's property at that time. However, since the assessment list last filed by the taxpayer was certified by him as containing a correct statement at that time, of each article of tangible personal property owned or controlled by him, such facts will be presumed to continue to exist indefinitely, in the absence of any evidence to the contrary. This is true for the reason it is based upon a long-settled and well-established legal principle prevailing in Missouri. Such legal principle was referred to by the court in the case of Kreisman v. Kornfeld, 208 SW 2d 79, and in which the court said at l. c. 84, 85:

"The presumption that a condition or state of things once shown to exist, in matters of a continuing nature, is presumed to continue until the contrary is shown, is long-settled and established law in this state, and we think it is applicable to the situation before us in this case. King v. Missouri Pacific Ry. Co., Mo. Sup., 263 S. W. 828, 833; Dean v. Kansas City, St. Louis & Chicago R. Co., 199 Mo. 386, 97 S. W. 910; Ruckels et al. v. Pryor, 351 Mo. 819, 846, 174 S. W. 2d 185, 198."

Honorable John A. Williams

Regardless of what the status of such property is, the listing of same by the assessor from the last prior list of the taxpayer may still be the best information obtainable, and any incorrectness in the listing of such property are mere irregularities, in no way affecting the legality of the assessment.

Therefore, upon the failure of a taxpayer of a first class county to file a tangible personal property assessment list within the time and manner provided by the applicable statutes, Section 137.345, RSMo 1959, requires the assessor of such county to assess the property which should have been listed at double its value. In performance of such duties the assessor may rely solely upon the next preceding, or the last preceding, year's assessment list filed by the taxpayer for information as to what property is to be listed and its estimated value, if said information is the best obtainable.

The second inquiry of the opinion requests reads as follows:

"Provided the answer is yes may this same information be used and redoubled each subsequent year the taxpayer fails to file his personal property return?"

We understand the second inquiry to ask that if the first one is answered in the affirmative, may the information as to the property and its estimated value shown on the assessment list last filed, be used, and such estimated value re-doubled for each subsequent year the taxpayer fails to file a list. In other words, may the assessor use the same information year after year, when no assessment list is filed by the taxpayer, and may he then "double" or "redouble" the assessment made by him for the next preceding year, for each subsequent year he makes such assessment.

No Missouri statutes or appellate court decisions limit the assessor but once to the use of information obtained by him from the next preceding or last preceding assessment list filed by the taxpayer, in assessing the property which should have been listed by the taxpayer. In the absence of any such authority it is believed the assessor may continue to use said information in making the assessment for each subsequent year the taxpayer fails to file a list, providing such information is the best obtainable by the assessor under the circumstances.

In preparing an assessment list for each subsequent year in such situations, the assessor cannot rely upon the next preceding year's list as prepared by him, for information as to the

Honorable John E. Williams

property and its value to be listed. It is not the best information. The applicable statutes require the assessor to perform his duties each year, and the performance of said duties is an independent proceeding from the performance of the same duties the year before. This principle was held to be the law of Missouri in the case of Cupples-Hesse Corporation v. Bannister, 322 SW 2d 817, in which the court said 1. c. 823, as follows:

"We think it important to note that defendant Assessor has the duty of assessing property each year (Section 137.080, RSMo 1949, V.A.M.S.), and that each year's assessment constitutes an independent proceeding and judgment. Boonville Nat. Bank v. Scholtzhauer, supra. In taxation matters it has been observed that the doctrine of res judicata is of but limited application, inasmuch as the assessment for each year is an independent determination for that year. Each year's tax is a separate transaction and each action relating to each year's tax is a new cause of action. In re Breuer's Income Tax, 354 Mo. 578, 190 S. W. 2d 248; Young Men's Christian Ass'n of St. Louis and St. Louis County v. Sestric, 362 Mo. 551, 242 S. W. 2d 497. It is not clearly seen that the issues of law and fact in the assessment of the 1956 tax were or are to be all the same in assessing the taxes for 1957 and for the stated subsequent years, even though, as alleged, the 'formulas and methodology' utilized by the Assessor in 1956 were or are to be utilized by the Assessor in the assessments for 1957 and subsequent years. It has been said that the weight of authority supports the proposition that the determination of value of property for taxation on a particular date is not conclusive as to value on a subsequent date. Annotation 150 A.L.R. 5, at page 79."

While the subsequent year's list may involve the same property owned or controlled by the taxpayer, and as expressed by the court in the above cited case, the same "formulas and methodology" may be utilized, as were previously employed, the value of the property shown on the preceding year's list as prepared by the assessor, cannot be used by him for a subsequent year's assessment because said assessment is not the true value of the property. On the contrary, said assessment is double the value.

Honorable John E. Williams

If the property with its doubled value were taken by the assessor as a basis upon which to prepare a subsequent year's list, and such value were redoubled from that of the preceding year's list, this would have the effect of assessing the property at four times the true value shown on the last assessment list filed by the taxpayer. Such a procedure is not authorized by Section 137.345, supra. He is not authorized to assess the property at more than double its value.

Therefore, in answer to the second inquiry of the opinion request it is our opinion the assessor may rely solely upon information from the next, or last preceding assessment list filed by the taxpayer in making assessment for subsequent years, if said information is the best obtainable. For each subsequent year he determines a penalty is due, the assessor shall list the same property with a value double that shown on the next or last preceding list so filed by the taxpayer, but he is unauthorized to redouble the value of such property for each subsequent year he prepares the list.

CONCLUSION

Therefore, it is the opinion of this office, that:

1. Upon the failure of a taxpayer to file an assessment list of all tangible taxable personal property owned or controlled by him during the current year, within the time and manner provided by the applicable statutes, Section 137.345, RSMo 1959, requires the assessor of a first class county to assess the property which should have been listed at double its value. In the performance of said duties, he may rely solely upon information as to the property and its estimated value obtained from the next preceding or last preceding year's list filed by the taxpayer if it is the best information obtainable.

2. It is further the opinion of this office the assessor may rely solely upon information from the next or last preceding assessment list filed by the taxpayer in making assessments for subsequent years if said information is the best obtainable. In such cases, for each subsequent year the assessor determines a penalty is due, he shall assess the property at double the value shown on said list so filed by the taxpayer, but he is unauthorized to redouble the value of such property for each subsequent year he prepares a list. In no case may he assess the property at more than double its value.

Honorable John E. Williams

The foregoing opinion which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

PHC:HW

PROSECUTING ATTORNEYS: Stenographic and clerical help for
SALARY FOR PROSECUTING Prosecuting Attorneys of third and fourth
ATTORNEYS STENOGRAPHER: class counties authorized by Senate Bill
SALARIES AND FEES: 324, 71st General Assembly not under
FEES AND SALARIES: provisions of Article VII Section 13, Mo.
Constitution. County Court has power to
approve or disapprove salaries of such help
fixed by Prosecuting Attorney.

November 10, 1961

Filed

97



Honorable Paul E. Williams
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. Williams:

We are in receipt of your request for an official opinion
of this office which reads as follows:

"Re: Senate Bill No. 324 71st General Assembly

1. Is the salary of a stenographer or clerk
therein referred to subject to any limitation
such as an office holder's raise during his
term of office?

2. What degree of control does the County
Court have over the Prosecuting Attorney by
reason of the words 'shall be fixed by the
Prosecuting Attorney with the approval of
the County Court'.

3. Does said act authorize the Prosecuting At-
torney to employ more than one person, and if
more than one what are the salary limitations?

Your opinion in these matters will be significant
to the operation of this office. Please advise."

Senate Bill No. 324, 71st General Assembly reads as follows:

"Section. 1. The prosecuting attorney in counties
of the third and fourth class may employ such
stenographic and clerical help as may be necessary
for the efficient operation of his office. The
salary of any stenographer or clerk so employed
shall be fixed by the prosecuting attorney with
the approval of the county court to be paid by
the county but such salary shall not exceed twenty-
seven hundred dollars per year in third class
counties and twelve hundred dollars per year in
fourth class counties."

Honorable Paul E. Williams

In answering the first question posed in your request we will assume that you have reference to Article VII, Section 13 of the 1945 Constitution of Missouri which provides as follows:

"Limitation on increase of compensation and extension of terms of office. --
The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

The stenographers and clerks provided for by Senate Bill 324 are not within the provision of this last quoted section. To come within this provision a person must be either a state, county, or municipal officer. The people here involved are obviously not state or municipal officers, inasmuch as they are hired by a county official, the prosecuting attorney, they are not county officials. To be an "officer" one must have been delegated some substantial part of the sovereign power, which he must exercise independently, with no control over him other than the law. State ex rel Webb v. Pigg (1952) 363 Mo. 133, 249 S.W. 2d 435. Stenographers and clerks hired by a prosecuting attorney to assist in the operation of his office, do not, of course, meet this test.

Even if such people were considered "officers" under Article VII, Section 13 of the Missouri Constitution this section would still not apply to them. First, Senate Bill 324 does not provide them with a definite term of office; the absence of this factor exempts them from the provisions of the section. State ex rel Rumbold v. Gordon (1911) 238 Mo. 168, 142 S.W. 315. Second, this bill provides statutory authority for the compensation of clerical and stenographic assistants to prosecuting attorneys in third and fourth class counties for the first time. A constitutional provision prohibiting a change of compensation after an election or appointment during the term of an officer does not apply where, prior to such time, no salary or compensation has been fixed for such office. State v. Nolte (1943) 351 Mo. 271, 172 S.W. 2d 854.

We are, therefore, of the opinion that Article VII, Section 13 of the 1945 Missouri Constitution does not apply to stenographic and clerical assistants employed by a prosecuting attorney under authority of Senate Bill 324.

We come now to the second question contained in your request which reads as follows:

Honorable Paul E. Williams

"2. What degree of control does the County Court have over the Prosecuting Attorney by reason of the words 'shall be fixed by the prosecuting attorney with the approval of the County Court'."

The degree of control exercised by the County Court must be determined by the interpretation to be given the word "approval". There are two possible interpretations. The giving of approval has been said to be a mere ministerial act. *Better Built Homes and Mortgage Company v. Nolte* (1923) 211 Mo. App. 601, 249 S.W. 743. On the other hand the giving of approval has been held to require the exercise of judgment and discretion. *Baynes v. Bank of Carruthersville* (1938) 118 S.W. 2d 1051. Under the first interpretation as applied to Senate Bill 324 the County Court would have no power to disapprove a salary of a stenographic or clerical assistant fixed by a prosecuting attorney. Under the second interpretation the county court would have the power to disapprove any salary fixed by a prosecuting attorney.

We believe that the legislative intent was that the word "approval" be given the second interpretation. The County Court is charged by the Missouri Constitution with the management of all county business, Article VII, Section 7, Constitution of Missouri 1945. It must manage the county's fiscal affairs so as to provide ways and means for the county to keep its expenditures within its income, and thereby comply with the constitutional limitations on indebtedness. Article VI, Section 26, Constitution of Missouri 1945. *Bradford v. Phelps County* (1948) 357 Mo. 830, 210 S.W. 2d 996. This duty could not be discharged by the county court if any other county office or any county officer could, without any superintendence by the court, determine the amount of funds to be expended in a particular area of the county government.

We come finally to the problem of whether a prosecuting attorney may employ more than one person as stenographic or clerical help and what, if he may, the salary limitations are.

The only requirement contained in Senate Bill 324 in regard to the number of persons employed is that the prosecuting attorney may hire such help "as may be necessary for the efficient operation of his office."

A prosecuting attorney may, therefore, employ the amount of people he deems necessary for the efficient operation of

Honorable Paul E. Williams

his office.

The salary limitation stated applies only to individuals. The act says "The salary of any stenographer or clerk so employed . . . shall not exceed \$2700.00 per year in third class counties and \$1200.00 in fourth class counties." This wording clearly means that each stenographer or clerk must be considered separately in regard to both the maximum limitation of their salary and the necessity of acquiring approval of the salary from the county court. If the county court finds that the number of employees hired by the prosecuting attorney is excessive in regard to the county budget it may accordingly limit the salary given to the individual employee.

CONCLUSION

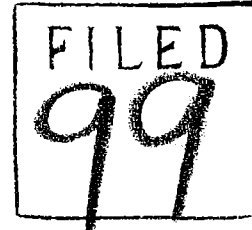
It is therefore the opinion of this office that stenographic and clerical help hired by the prosecuting attorney in third and fourth class counties under the authority of Senate Bill 324, 71st General Assembly are not within the provisions of Article VII, Section 13, Constitution of Missouri of 1945, which prohibits increases in the salaries of public officers during their term of office. It is further our opinion that the county court has the power to disapprove the salaries of such stenographic and clerical help as fixed by the prosecuting attorney. It is also our opinion that the Prosecuting attorney may hire more than one stenographer or clerk as long as the number of employees is necessary for the efficient operation of the office and that the salary limitation thereon must be exercised in regard to each individual employee.

The foregoing opinion, which I hereby approve, was prepared by my assistant Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

BE:ms



July 26, 1961

Honorable Larry M. Woods
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Woods:

This is in answer to your letter of July 24, 1961, in which you requested amplification and clarification of the opinion of this office of November 23, 1960, to Honorable Lon J. Levvis, Prosecuting Attorney, Audrain County, Missouri. The holding of that opinion was that the taxes in question should be held in a fund and paid over to the school district eventually determined to be entitled to receive it. On June 30, 1961, the Supreme Court of Missouri in Case No. 48463, State of Missouri ex inf. John M. Dalton, ex rel Board of Directors of Centralia R-VI of Boone County, Missouri vs. Leonard Eckley et al, Board of Directors of Consolidated School District C-II of Audrain County, rendered its opinion that the Centralia Reorganized School District R-VI of Boone County was the school district entitled to jurisdiction over the disputed area, effective on June 13, 1960. The fifteen day period, provided by Supreme Court Rule 83.16 for filing a motion for rehearing, has passed and no motions have been filed in this case in the Supreme Court and this case is now final. Therefore Centralia Reorganized School District R-VI of Boone County is the district entitled to receive these taxes specified in our opinion of November 13, 1960.

In your letter you ask a further question concerning certain delinquent taxes which were assessed for the calendar year for 1959 and prior years which had been collected since the opinion of this office on November 23, 1960. The opinion of November 23, 1960 did not deal with the taxes for the year 1959 and prior years in any way. The opinion of this office concerned only the taxes for the year 1960. The opinion of the Supreme Court issued on June 30, 1961 and mentioned above fixed the date of the transfer of the jurisdiction over the disputed area as June 13, 1960. Therefore the opinion of the

Honorable Larry M. Woods

Supreme Court has no effect on taxes for the year 1959 and prior years. Thus there is no holding by an opinion of this office or by a judgment of the court which in any way affect the delinquent taxes for the years 1959 and prior years. These delinquent taxes are therefore to be treated in the same manner as all other delinquent taxes for the year 1959 and prior years.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WW:aa

CC: Honorable Leon Terry, President
Audrain County C-II School District
Thompson, Missouri

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri

Honorable Elwyn L. Goodson
Collector of Revenue
Mexico, Missouri

CORPORATIONS:

Charitable, religious, or other corporations subject to Chapters 352 and 355, RSMo 1959, may not qualify as executors under Missouri's Probate Code, but may serve as testamentary trustees in carrying out trusts only for any of the legitimate purposes for which they are organized.

PROBATE:

August 2, 1961



Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Woodfill:

This opinion is rendered in reply to your inquiry reading as follows:

"There has been called to my attention a situation related to possible missuser of franchise that could call for quo warranto proceedings under either Section 352.240 or 355.490, Revised Statutes of Missouri, 1949.

"In this connection I would appreciate your opinion in regard to the following questions:

"1. Does a religious or charitable association incorporated by pro forma decree under Chapter 352, Revised Statutes of Missouri 1949, have the power to accept the appointment and act as executor or testamentary trustee, in the absence of provision therefor in its charter or articles, in a situation serving no benevolent, religious, scientific, fraternal-beneficial or educational purpose?

"2. Would such a provision in the charter or articles be valid, and permit such acts?

"3. Would it make any difference if the association served with or without compensation?

"4. Would the answers to the foregoing questions be any different in the case of a corporation organized under, or accepting the provisions of, Chapter 355, Revised Statutes of Missouri 1949?"

Honorable James E. Woodfill

Article XI, Section 5, Missouri's Constitution of 1945 provides:

"No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor."

At 33 C.J.S., Executors and Administrators, Section 28, j, p. 916, we find the following text:

"The right to act as executor is usually restricted to corporations of a fiduciary character, and will ordinarily be denied a corporation designated by the will as executor where its charter powers do not include the right to act in such capacity;
* * *."

As late as 1924, in the case of State ex rel. Burnes National Bank v. Duncan, 302 Mo. 130. 1.c. 137, 257 S.W. 784, the Supreme Court of Missouri reviewed our statutory provisions on this subject and spoke, in part, as follows:

"Before any corporation in this State can have a right to act in a fiduciary relation in administering estates there must be express authority given that kind of a corporation and that statutory authority must be construed in pari materia with the chapter relating to Administration."

We find no express authority in Chapter 352, RSMo 1959, governing the formation of benevolent, religious, scientific or charitable corporations, authorizing such corporations to act as executor under a last will, or as administrator with or without the will annexed, of the estate of any deceased person.

Section 473.117, RSMo 1959, disclosing what persons are disqualified from administering estates of deceased persons, takes cognizance of the fact that a corporation may be named as an executor in a will when the following language is used:

"* * 2. When any corporation is named as executor in any will hereafter executed, and qualifies as such, * * *."

Honorable James E. Woodfill

In *State ex rel. Burnes National Bank v. Duncan*, supra, the Court spoke as follows at 302 Mo. 130, l.c. 137, on the power of corporations to act as executors:

"It must be remembered that there was no common law right to make a will or appoint an executor. It is purely a matter of statutory regulation. The statute authorizing certain persons to act as executor is an enabling statute, and it must be construed according to the intent of the Legislature in enacting it. The intent of the Legislature to include only natural persons in the authority granted in that article appears not only in the terms of the article, but is shown by the actual grant, in another statute, of the authority to trust companies to act as executors, and in other fiduciary relations. There would have been no need of such affirmative act if this chapter on Administration had granted such authority to all corporations."

When the Court, in the preceding quotation from *State ex rel. Burnes National Bank v. Duncan*, supra, referred to another statute as containing a grant of power to trust companies, it was referring to what is now Section 363.170, RSMo 1959, which reads, in part, as follows:

"Corporations may be created under this chapter for any one or more of the following purposes:

* * * * *

"(9) To act as executor and trustee under last will, or as administrator with or without the will annexed, of the estate of any deceased person, * * *."

The holding by the Supreme Court of Missouri in *State ex rel. Burnes National Bank v. Duncan*, supra, was that, exclusive of trust companies, only natural persons were qualified to be appointed executors or administrators of deceased persons' estates. That ruling was reversed by the Supreme Court of the United States insofar as it was applicable to national banks, and the latter ruling may be found cited as *State of Missouri ex rel. Burnes National Bank v. Duncan*, 265 U.S. 17, 44 S. Ct. 427, 68 L. Ed. 381. The Supreme Court of the United States held that the power given by Congress to national banks to act as trustee, executor, administrator or in any fiduciary capacity in which state banks and trust companies

Honorable James E. Woodfill

which come into competition with national banks are permitted to act, transcended the State law on the subject. However, such ruling only modifies the ruling of the Supreme Court of Missouri to the extent that it comprehended national bank corporations.

In view of the foregoing it must be reasonably concluded that no corporation formed under the provisions of Chapter 352 RSMo 1959, may qualify to serve as executor by appointment under Missouri's probate code found at Chapters 472, 473, 474 and 475, RSMo 1959, and any attempt to incorporate such powers into a corporate charter acquired under Chapter 352, RSMo 1959, would be in excess of powers granted. In the absence of power to act as an executor a corporation's offer to serve as executor without compensation would avail it nothing.

We have reviewed the statutory provisions found in Chapter 355, RSMo 1959, embracing The General Not For Profit Corporation Law of Missouri, and no express authority has been found therein allowing corporations subject thereto to serve as executor. This fact places such corporations in the same position as those created under Chapter 352, RSMo 1959, with reference to their right to serve as executor.

Up to this point we have considered whether the corporations in question may qualify as executors of the estates of the deceased persons, and to such question we have given a negative answer. Attention is now given to determining whether those corporations formed under Chapters 352 and 355, RSMo 1959, may serve as testamentary trustees.

The following language from Riggs v. Moise, 344 Mo. 177, 1.c. 182-184, 128 S.W. 2d 632, will disclose the difference in legal character between an executor on the one hand, and a testamentary trustee on the other:

"One who creates a trust has the freedom of choice and complete power to name his trustee so long as such trustee possesses the legal qualifications. * * * No procedure in any court for the confirmation of the appointment of a trustee so named is compelled in Missouri, as it is in some states, as a condition precedent to a trustee entering upon the performance of his duties. * * * The court cannot 'prevent or promote the transmission and vesting of the title of estates devised in trust, in those who are named trustees.'"

To the same point we submit the following language from In re Beauchamp's Estate (Mo. App.), 184 S.W. 2d 729, 1.c. 733:

Honorable James E. Woodfill

"In the first place, there is no question that the functions of executor and trustee may be united in the same person who may act in both capacities, but the capacities are separate and distinct. There is a fundamental difference between the office of trustee and that of executor and the office of trustee is not merged in that of executor by the designation of the same person as both. The person designated acts in a dual capacity. State ex rel. Richards et al. v. Fidelity & Casualty Co. of New York (Mo. App.) 82 S.W. 2d 123."

Section 352.030, RSMo 1959, provides:

"Corporations may be formed under the provisions of this chapter, to execute any trust the purpose whereof is within the purview of this chapter, and may receive and take, by deed or devise, in their corporate capacity, any property, real and personal, for the uses and purposes of such trust, and execute the trust so created."

Section 355.090, RSMo 1959, provides, in part, as follows:

"Each corporation shall have power:

* * * * *

(5) To receive and take by gift, grant, assignment, transfer, devise or bequest, any real or personal property in trust for any charitable, religious, educational, scientific, or benevolent purposes and for such other purposes as may be necessary and proper for carrying on its legitimate affairs and to perform all such trusts in accordance with the terms, conditions, limitations, and restrictions thereof; * * *."

Section 352.030, RSMo 1959, quoted supra, applicable to charitable, benevolent and religious corporations formed under Chapter 352, RSMo 1959, clearly confers authority on such corporations to act as testamentary trustee in carrying out any trust within the purview of said chapter. Section 355.090, RSMo 1959, quoted supra, clearly confers authority on corporations formed under Chapter 355, RSMo 1959, to act as testamentary trustee for any charitable, religious, educational, scientific, or benevolent purpose for which said corporation was formed.

Honorable James E. Woodfill

CONCLUSION

It is the opinion of this office that no corporation formed under Chapters 352 or 355, RSMo 1959, may qualify as executor of estates of deceased persons, but they may serve as testamentary trustees in carrying out trusts only for any of the legitimate purposes for which they are organized.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

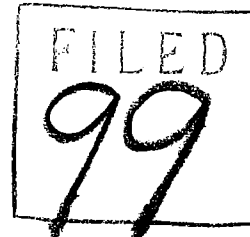
THOMAS F. EAGLETON
Attorney General

JO'M:BJ

COUNTIES: COUNTY OFFICERS:
MILEAGE: CIRCUIT CLERKS:
MAGISTRATE JUDGES:
MAGISTRATE COURTS:
SHERIFFS:
ASSESSORS:
CORONERS:
SALARIES, FEES:

Compensation and mileage increases
authorized by 71st General Assembly.

December 6, 1961



Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Woodfill:

We are in receipt of your request for an official opinion
of this office which reads as follows:

"The County Clerk of Vernon County, Missouri
received a letter from the State Auditor in
regard to salary increases and also in regard
to certain mileage allowance increases.

"He enclosed therewith a schedule of the addi-
tional salaries, a copy of which I am enclosing.

"Apparently, from this enclosed list, the only
salary increase in Vernon County which would
become effective immediately, would be that of
the Circuit Clerk. The rest of them would
apparently become operative at the beginning
of the next term of each office.

"However, there have been inquiries made of
the Clerk, and he desired that I write your
office to obtain your official opinion in
regard to these salary increases and also in
regard to mileage increases of officers of
the county.

"I imagine you have already had inquiries in
this regard, so if you have rendered an
official opinion, please send me a copy

Honorable James E. Woodfill

thereof. If you have not rendered an official opinion in this regard, please give me your opinion as to when the salary increases become effective and also as to when the mileage allowance increases of the various officers become effective."

Inasmuch as Vernon County is a third class county with township organization and with a population of 20,540 we will confine our opinion to the compensation and mileage increases voted by the 71st General Assembly to officers of that type of county.

1. Circuit Clerks. Vernon County has separate offices in regard to the Circuit Clerk and Recorder of Deeds. We therefore first direct your attention to the additional compensation granted by Senate Bill 288, 71st General Assembly (Now Section 483.331 RSMo 1959) to such Circuit Clerks. It reads as follows:

"1. In addition to his other duties, the clerk of the circuit court in all counties of the third class wherein the offices of the circuit clerk and recorder are separate shall prepare and deliver to the judge of the circuit court, to the judicial conference and to the committee on legislative research an annual report showing the number of civil, criminal and juvenile cases filed in the court during the preceding year, their disposition, their classification, the number of cases pending at the end of the year and such other information as the judge may require.

"2. For the performance of the duties required by subsection (1), the clerk of the circuit court in counties of the third class shall receive, in addition to all other compensation now provided by law, twelve hundred dollars per annum to be paid out of the county treasury as his other compensation is paid."

Article VII, Section 13, Constitution of Missouri 1945 reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Honorable James E. Woodfill

Inasmuch as the first paragraph of Senate Bill 288, 71st General Assembly imposes new and additional duties on the Circuit Clerks involved and the second paragraph states that the additional compensation therein authorized is for the performance of the duties stated in paragraph 1, the clerks were entitled to the additional compensation at the time Senate Bill 288 took effect on October 13, 1961. *Mooney v. County of St. Louis* (Mo. Sup. 1956) 286 S.W. 2d 763.

2. Stenographic and Clerical Help of Prosecuting Attorneys.

We enclose a copy of the opinion of this office issued to Honorable Paul E. Williams under date of November 10, 1961, which answers questions relative to the compensation of stenographic and clerical help of Prosecuting Attorneys in relation to Article VII, Section 13, Constitution of Missouri of 1945.

3. Magistrate Judges. The applicable portion of House Bill 281, 71st General Assembly (Now Section 482.150 and Section 482.250 RSMo 1959) reads as follows:

"1. The salaries of all magistrates shall be paid by the state, except that the state shall not pay the salaries of additional magistrates whose offices are created by order of the circuit court as provided for in article V, Section 18, of the constitution; but the districts assigned to such additional magistrates shall be designated as 'additional magistrate districts' and the salaries of such magistrates shall be paid by the county. The annual salaries of magistrates shall be as follows:

* * * * *

"(4) In all counties now or hereafter having a population of more than fifteen thousand inhabitants but not more than thirty thousand inhabitants, with an assessed valuation of more than twenty-six million dollars, the sum of eight thousand four hundred dollars;"

Vernon County with a population of 20,540 and an assessed valuation of \$31,829,524 falls within the quoted category.

Section 1, Article V of the constitution of Missouri 1945 reads as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of

Honorable James E. Woodfill

criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

As can be seen from a reading of this section, Magistrate Courts are vested with a portion of the judicial power of the State of Missouri. Section 24, Article V of the Constitution of Missouri of 1945 reads as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

We enclose copies of opinions of this office issued to Honorable E. G. Armstrong under date of October 4, 1946, and to the Honorable Leslie A. Welch under date of December 29, 1950, which hold that in view of Section 24, Article V, above quoted, there is no constitutional prohibition against increasing the salaries of members of the judiciary during their terms of office. Under the reasoning set forth in those opinions, magistrate judges are entitled to the increased compensation provided for in House Bill 281, 71st General Assembly.

4. Clerks, deputies and employees of magistrate courts.
House Bill 462, 71st General Assembly now Section 483.490, RSMo 1959, reads in part as follows:

"1. Salaries of clerks, deputy clerks and employees provided for in section 483.485 shall be paid by the state within the limits herein provided upon requisition filed by the judges of the magistrate

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courts; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in section 482.010, RSMo shall be paid by the county as the salaries of such magistrates are required to be paid. The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums:

* * * * *

"(6) In all counties now or hereafter having a population of more than fifteen thousand inhabitants but not more than thirty thousand inhabitants, with an assessed valuation of more than twenty-four million dollars, the sum of four thousand four hundred dollars; provided that in all such counties in which the probate court is required by law to be held in more than one place such salaries shall not exceed the sum of six thousand nine hundred dollars."

This bill does not raise the compensation of a specific office or person, but instead raises the total amount which may be paid by the state for all help in the magistrates office. It is the opinion of this office that any individual pay raises which may be given within the total authorized by this section are not subject to the prohibition stated in Section 13, Article VII of the Missouri Constitution. Clerks, deputy clerks, and other employees of magistrate courts are not given a definite term of office; this fact exempts them from the provisions of the last mentioned constitutional provision. State ex rel Rumbold v. Gordon (1911) 238 Mo. 168, 142 S.W. 315.

5. Coroners. The portion of House Bill 533, 71st General Assembly, (Section 58.110 and 58.120, RSMo 1959) which concerns third class counties reads as follows:

"The coroner in all counties of the third class shall receive for his services annually, the following: In counties with a population of less

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than ten thousand, the sum of two hundred and forty dollars; in counties with a population of ten thousand and less than fifteen thousand, the sum of three hundred and sixty dollars; in counties with a population of fifteen thousand and less than twenty thousand, the sum of four hundred and eighty dollars; in counties with a population of twenty thousand and less than twenty four thousand, the sum of seven hundred and twenty dollars, in counties with a population of twenty-four thousand and less than thirty thousand, the sum of nine hundred and sixty dollars; and in counties having a population of thirty thousand and more, the sum of one thousand two hundred dollars."

58.120-

"In each county of the third and fourth classes, the county court shall allow the coroner, payable at the end of each month out of the county treasury, ten cents per mile for each mile actually and necessarily traveled in the performance of his official duties."

Coroners are county officers. Volume 18, C. J. S., Coroners, Section 1, page 288. They are, therefore, within the prohibition of Section 13, Article VII regarding an increase of compensation during their term of office.

Another problem arises in regard to the mileage allowance provided for coroners provided by House Bill 533. Coroners in both third and fourth class counties were given an increase in mileage from five cents to ten cents per mile (the former allowance was authorized by Laws 1945, page 992, Section 1 (a).) Whether coroners of counties of both classifications are entitled to the increased allowance depends on whether such allowance is "compensation" within the meaning of Section 13, Article VII.

Volume 67, C.J.S., Officers, Section 91, page 330 reads in part as follows:

"* * *In a limited sense, mileage may become a part of the compensation of an officer; if the mileage allowance is limited to the amount actually expended in traveling, it cannot add

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anything to the income of the recipient of the salary; but, if the mileage is not so limited, as where a certain amount is allowed for each mile traveled and this amount exceeds the actual mileage charged, the balance above such charge becomes a part of the official income or compensation."

The cases of Reed v. Gallet (1931) 50 Idaho 638, 299 P. 337 and Marioneaux v. Cutler (1907) 32 Utah 475, 91 P. 355 also expressed this principle.

As can be seen from the above quoted bill the amount it provides is a certain amount (10¢) for "each mile actually and necessarily traveled". There is no indication that the legislature intended otherwise. There is no limitation here as is the situation with House Bill 255, 71st General Assembly concerning county judges and their compensation and mileage allowance which provided that the allowance could only be collected when the person seeking it had used his private automobile. We, therefore, are of the opinion that the mileage allowance given to coroners is "compensation" within the meaning of Section 13, Article VII, Missouri Constitution 1945.

6. Township Assessors. House Bill 204, 71st General Assembly, now Section 65.240 RSMo 1959, reads as follows:

"The ex officio township assessor in each township, in counties of the third and fourth classes, which now or may hereafter have township organization, as compensation for his services, shall receive sixty-five cents for each list taken by him; and for each tract of land or town lot assessed by him, and properly entered in the township land book, he shall receive ten cents; and for each entry in the tangible personal property tax book, he shall receive five cents; one-half to be paid by the county and one-half by the state, as now provided by law. All the personal property listed belonging to any one individual, or to husband and wife, or to any company or firm shall constitute only one list and all the land owned by the same person in any one section shall constitute but one tract, and all the land owned by any one person in any one block shall constitute but one lot, as to compensation. The assessor

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in counties of the third and fourth class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book."

The only increase provided by this bill is in regard to the fees received by township assessors for property lists prepared by them; the new fee provided for is a 5¢ increase over what was formerly provided by the old section 65.240 which was taken from A. L. 1953, page 374, Section 1. Such fees are "compensation" under the provisions of Section 13, Article VII. State ex rel Emmons v. Farmer (1917) 271 Mo. 306, 196 S.W. 1106, township assessors presently holding office can not therefore receive the increase during their present term of office

7. County Judges. We are enclosing a copy of an opinion of this office issued to the Honorable J. R. Fritz under date of October 24, 1961, which answers the questions in regard to both increased compensation and increased mileage for county judges of both third and fourth class counties.

8. Sheriffs. Senate Bill 173, 71st General Assembly, now Sections 57.300 and 57.430, RSMo 1959, provides increased mileage for sheriffs. Each section provides for a separate mileage allowance.

The amount authorized by Section 57.300, RSMo 1959, represents an increase of five cents a mile over the old law; Section 57.430 authorizes a three cent per mile increase. Here again arises the question of whether the mileage allowance provided for is "compensation" within the meaning of the constitutional provision with which we are concerned. Section 57.300, RSMo 1959, provides:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Fifteen cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

It is the opinion of this office that the mileage allowance provided for in this section is not compensation and that sheriffs are therefore presently entitled to it. Section 13, Article VI of the Constitution of Missouri 1945 provides:

Honorable James E. Woodfill

"Compensation of officers in criminal matters- fees. All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Under the provisions of this section, all state and county officers except constables and justices of the peace are to be compensated only by salary for their services with regard to criminal matters, and the provision is further made that fees and charges collected by officers in such matters are to be paid into the General Revenue Fund.

Section 57.410, RSMo 1959, states:

"In all counties of the third and fourth classes, the sheriff shall charge and collect for an on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment and transportation of persons accused of or convicted of a criminal offense, except such criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

The mileage chargeable under Section 57.300, RSMo 1959, must be paid into the county treasury and cannot, therefore, be compensation for sheriffs.

Section 57.430 RSMo 1959, reads as follows:

"1. In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed ten cents per mile, and actual expenses not to exceed

Honorable James E. Woodfill

ten cents per mile for each mile traveled, the maximum amount allowable to be one hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote."

"2. At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

It is also the opinion of this office that the mileage allowance provided for in this section is not compensation, and that sheriffs are therefore presently entitled to the increase. This section clearly spells out the legislative intent that the mileage allowance is limited to reimbursement for expenses actually incurred. It provides for payment of actual expenses "not to exceed" ten cents a mile. Under this section, if the actual expenses amount to less than ten cents a mile, then the county court is not authorized to pay the maximum. On the other hand, if such expenses exceed ten cents a mile, the sheriff is not entitled to reimbursement for such

Honorable James E. Woodfill

excess. It is to be noted that under paragraph 2 of Section 57.430, RSMo 1959, an itemized statement must be filed and this statement is referred to in the statute as "claim for reimbursement".

CONCLUSION

It is therefore the opinion of this office that:

(1) The present circuit clerk of Vernon County is entitled to the additional compensation provided by Senate Bill 288, 71st General Assembly.

(2) Magistrate Judges are entitled to increased compensation provided by House Bill 281, 71st General Assembly.

(3) Clerks, deputies and employees of magistrate courts who do not have a definite term of office, are not subject to the provisions of Section 13, Article VII, Constitution of Missouri, 1945.

(4) The coroners of third and fourth class counties who are now in office are entitled to neither the increased compensation nor the increased mileage provided by House Bill 533, 71st General Assembly during their present terms of office.

(5) Township assessors of third and fourth class counties which have township organization who are now in office are not entitled to the increased fees provided by House Bill 204, 71st General Assembly, during their present terms of office.

(6) Sheriffs now in office are entitled to the increased mileage allowances provided by Senate Bill 173, 71st General Assembly, during their present terms.

The foregoing opinion, which I hereby approve was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EE:ms

SPECIAL ROAD DISTRICTS:

May issue warrants in anticipation of current year's income. May function with two commissioners pending appointment of third.

August 11, 1961

Honorable Stephen H. Zeilmann
Representative
Osage County
Linn, Missouri



Dear Mr. Zeilmann:

This is in response to your request for an opinion dated July 26, 1961 which reads as follows:

"Pursuant to our telephone conversation this morning, I am submitting herewith some pertinent information on which I humbly request an opinion. I have been asked by several of my constituents to secure an opinion from your office.

"The State Highway Department is contemplating building a road into Linn, the county seat of Osage County. This road is officially designated as Route 'V'. As you know, the right of way for all supplementary roads such as Route 'V' must be secured and deeds for same made to the State Highway Department with no cost to the Department. This often times makes it necessary to condemn some land or property, and have an appraisal made of same. In the city of Linn, two separate parcels of property have been condemned and appraised. The appraisal value was set at \$2300.00 for these two parcels of property. The 'City of Linn Special Road District' requests an opinion whether or not the board may issue warrants in this amount. The amount of tax revenue received by the special road district in 1960 was \$3000.01 and no change has been made in the levy for 1961, so they will receive at least this amount in 1961. Section 233.135 R.S. Mo. 1959 seems to indicate clearly that this is permissible. Nearly all funds in the special road districts have been spent at this time for street improvements with insufficient funds left to pay for the appraisals, unless warrants can be issued against this year's anticipated revenue.

Honorable Stephen H. Zeilmann

"One member of the three man board of the special road district resigned recently, leaving only two members at present, as no appointment has been made to fill the vacancy. Does the present two members have the authority to do business before the vacancy is filled?

"Would appreciate an opinion on the above matters at your earliest convenience."

Section 233.135 RSMo 1959 provides:

"Such board may issue warrants on the treasurer of the board in payment of the expenses and obligations which the board are authorized to incur in behalf of such special road districts and such warrants may be issued in anticipation of the income and revenue provided for the year for which the debt or obligation for which the warrant is issued was incurred; but such districts or such board on behalf thereof shall not become indebted in any manner or for any purpose to an amount exceeding in any one year the income and revenue provided for such year; provided, however, that this shall not prevent the incurring of indebtedness under bond issue as is or may be provided by law."

We have no difficulty in agreeing with the statement in your letter that the above quoted section "seems to indicate clearly" that warrants may be issued in anticipation of the district's annual income. It is the opinion of this office that under the facts set out in your letter, with the exception noted below, it would be entirely proper for the "City of Linn Special Road District" to issue warrants not in excess of the anticipated income of the current year for debts of the district incurred this year.

The second question stated in your request is whether, following the resignation of a member of the Board of Commissioners and pending the appointment of his successor, the Board may continue to conduct the business of the district. Although

Honorable Stephen H. Zeilmann

there is no specific statutory statement in the Chapter 233 as to what constitutes a quorum of such a body, we believe that the two remaining members may continue to act as the board legally constituted during the interim. Section 1.050, RSMo 1959 provides:

"Words importing joint authority to three or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the law giving the authority."

CONCLUSION

It is the opinion of this office that the City of Linn Special Road District may issue warrants in anticipation of its income for the current year and may continue to carry on its business through its two remaining commissioners pending the appointment of the third.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:mw

STATE HIGHWAY COMMISSION: A municipality has the exclusive right to determine the time when and the place where a traffic signal shall operate within the limits of such municipality (except as may be otherwise provided by law and except to the extent such right has been limited by contract with the highway commission); the State Highway Commission has no power or authority to make any changes or alterations in the operation of such signal; and the State Highway Commission has no power to contract with school officials with respect to the operation of traffic signals.

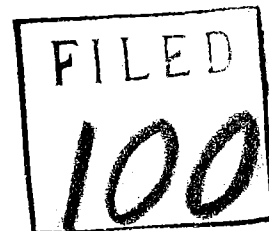
TRAFFIC REGULATIONS:

SCHOOLS:

CONSTITUTIONAL LAW:

August 18, 1961

Honorable Robert A. Young
Representative, First District
St. Louis County
3500 Adie Road
St. Ann, Missouri



Dear Mr. Young:

You have requested an opinion of this office with respect to the following:

"In view of your opinion dated June 14, 1956 rendered to the Honorable E. Gary Davidson, can the State Highway Department enter into a contract with the principal of a school, or other school officials, giving the school principal or school officials authority to designate the hours a traffic signal shall operate, the authority to place an adult at this signal to operate same, when this signal controls both pedestrian and vehicular traffic, and when this signal is located within the incorporated limits of a municipality, or would the municipality have the exclusive right to determine this under their police powers granted by State Statutes?

"Also we would like to know if the State Highway Department has the power or the authority over the objection of the municipality involved to alter or change the operation of the signal. The signals in question were originally placed by the State Highway Department."

The opinion referred to in your letter rules that the State Highway Commission may not regulate the speed of motor vehicle traffic over state highways through incorporated municipalities and that the Commission is not authorized to erect signs prohibiting turns or other movements on such highways. We continue to adhere to that view.

Honorable Robert A. Young

Section 29, Article IV, of the Constitution of 1945, provides in part that the Highway Commission "shall have authority over and power to locate, relocate, design and maintain all state highways".

Section 31, Article IV, of the Constitution provides as follows:

"Any state highway authorized herein to be located in any municipality may be constructed without limitations concerning the distance between houses or other buildings abutting such highway or concerning the width or type of construction. The commission may enter into contracts with cities, counties or other political subdivisions for and concerning the maintenance of, and regulation of traffic on any state highway within such cities, counties or subdivision."

The foregoing provisions of the Constitution do not grant to the Commission the general power to regulate traffic. We do not believe that the granting of "authority over" all state highways may reasonably be construed as a delegation to the Commission of all of the state's police powers in respect to the regulation of traffic on state highways.

Prior to the adoption of the 1945 Constitution, our Supreme Court construed the statutory provision that state highways shall be under the control of the Commission and held that such language did not evidence an intent to affect the police power of cities over state highways within their limits or vest the Commission with jurisdiction over such highways superior to the jurisdiction of the municipal authorities. See *State on inf. McKittrick ex rel. City of California v. Missouri Utilities Co.*, 96 S.W. 2d 607, 1.c. 614, in which the court ruled as follows:

"Respondent next contends that since two of the streets on which its lines and poles are located are designated as a part of the state highway system, the highway department alone has jurisdiction over them and the poles can be removed only upon order of the commission."

"Section 8134, R.S.Mo. 1929 (Mo. St. Ann. §8134, p. 6929) provides in part: 'The state highways as herein designated shall be under the * * * control of the commission.'"

Honorable Robert A. Young

"Section 8109, R.S.Mo. 1929 (Mo. St. Ann. §8109, p. 6895) provides in part: 'The location and removal of all telephone, telegraph and electric light and power transmission lines, poles, wires, and conduits and all pipe lines and tramways, erected or constructed * * * by any corporation, association or persons, within the right of way of any state highway, in so far as the public travel and traffic is concerned, and in so far as the same may interfere with the construction or maintenance of any such highway, shall be under the control and supervision of the state highway commission. * * * Provided, however, that the effect of any change ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right of way of the highway.'

(Court's italics.)

"Section 8133, R.S.Mo. 1929 (Mo. St. Ann. §8133, p. 6929) permits the location of a state highway, under certain circumstances, through city streets. Cf. State ex rel. Hannibal v. Smith (1934) 335 Mo. 825, 74 S.W.2d 367.

"It was, however, clearly, not the intention of the Legislature to vest the commission with jurisdiction over these portions of city streets, so designated as parts of state highways, superior to the jurisdiction of the municipal authorities. Certainly the city's police power as to such streets remains unaffected. Orders under section 8109 are limited to those necessary to prevent interference with traffic on the highways and with highway construction. In matters immediately concerned with the construction of paving of the highways and their maintenance, the commission has jurisdiction. But in other matters the city's power continues. * * *

The authority granted to the commission by Section 31 of Article IV to enter into contracts for and concerning "regulation of traffic" on state highways within a municipality is not a grant of authority to the commission to regulate traffic.

Honorable Robert A. Young

An examination of the proceedings of the constitutional convention reveals nothing whatever which would indicate that any delegate contemplated that the highway commission was to exercise the legislative function of regulating all traffic on state highways. What is now Section 31, Article IV, was approved with no discussion other than such as briefly related to the maintenance of those streets in cities which the commission decided to make a part of the highway system.

Subsequent legislative history of traffic regulations as well as the contemporaneous policy of the highway commission, while not decisive, serves to fortify the conclusion that there was no intent by either of the foregoing constitutional provisions to grant to the commission the general power to regulate or control traffic on state highways. Of course, to the extent that the commission has been granted authority to limit access to, from and across state highways by section 29 of the Constitution, there is a delegation of the power to regulate traffic but that particular power is not involved in the question here under consideration.

We do not question the power of the Legislature to limit and curtail the police power of municipalities or to delegate to the Commission authority to regulate traffic on state highways. In general, however, the Legislature has vested in municipalities the police powers with respect to traffic regulations within the limits of such municipalities. In several specific instances, not here involved, it may be noted that the Legislature has delegated to the Commission certain limited powers to regulate traffic, and to such extent the Commission has been vested with a portion of the police power. For example, Section 304.024, RSMo 1959, provides with respect to highways under the jurisdiction of the state highway commission that such commission may erect or place signs establishing crossovers or crosswalks or prohibiting or restricting the stopping, standing or parking of vehicles on any highway where in its opinion such stopping, standing, or parking is dangerous to those using the highway or would unduly interfere with the free movement of traffic thereon. Such instances of delegation to the commission of the police power to regulate traffic are the exception and not the rule. In our view, therefore, the general police power to regulate traffic within municipalities is still vested in such municipalities except to the extent it may be otherwise provided by law.

School boards and school officials have no power to make any traffic regulations or to supersede the regulations made by the municipality within which such schools are operated. We are of the opinion, therefore, that the highway commission may not contract with any school official or body for the purpose of delegating to such school or official thereof, the right to make or enforce traffic regulations or to operate a signal for such purpose within a municipality. Even if the commission

Honorable Robert A. Young

itself did have the power to regulate traffic, and it does not, it is our view that the Commission could not in any event delegate such power to a school official.

The Davidson opinion referred to in your letter ruled that the contracts referred to by Section 31 of Article IV of the Constitution "are primarily for the purpose of dealing with the costs of maintaining and regulating traffic in any such municipality." While this conclusion may be true insofar as concerns the maintenance of highways in municipalities, we believe that the construction in the Davidson opinion of this constitutional provision is too narrow insofar as pertains to regulation of traffic, and to that extent is no longer the view of this office. To avoid any confusion, the Davidson opinion is hereby withdrawn.

We continue to adhere, however, to the conclusion reached in the foregoing Davidson opinion that the constitution does not take from municipalities the police power which is vested in them by statute, insofar as general regulation of traffic is concerned. Cities may, however, under the foregoing constitutional provision, enter into contracts with the Commission to make and enforce regulations of traffic which are reasonable in view of the nature and purpose of the particular highway and which serve to facilitate the use thereof as contemplated by the Commission. To that extent, the municipality may validly agree to limit its exercise of the police power concerning the regulation of traffic. All such regulations which are made, enforced, or changed pursuant to such contract, are nevertheless those of the municipality, and not the regulations of the Commission.

CONCLUSION

It is the opinion of this office that (except as may be otherwise provided by law and except to the extent such right has been limited by contract with the highway commission) a municipality has the exclusive right to determine the time when and the place where a traffic signal shall operate within the limits of such municipality, that the State Highway Commission has no power or authority to make any changes or alterations in the operation of such signal, and that the State Highway Commission has no power to contract with school officials with respect to the operation of traffic signals.

The foregoing opinion which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

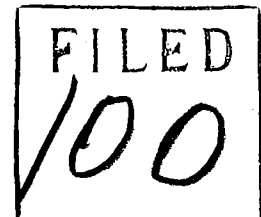
Yours very truly,

THOMAS F. EAGLETON
Attorney General

Opinion No. 437
Answered by Letter

December 1, 1961

Honorable Robert Young
Representative, First District
3500 Adie Road
St. Ann, Missouri



Dear Mr. Young:

This is in answer to your letter of recent date in which you state that you are requesting the opinion of the Attorney General regarding the question of whether or not a referendum on an ordinance of the town of Bridgeton, Missouri, is authorized upon a petition signed by certain residents of such city.

Section 49 of Article III of the Constitution provides as follows:

"The people reserve power to propose and enact or reject laws and amendments to the Constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided." (Emphasis ours)

The provisions of Section 52(a) of Article III of the Constitution pertaining to the referendum provide only for petitions for a referendum on laws passed by the General Assembly, and do not provide for a referendum on municipal ordinances. There is therefore no constitutional grant to the voters of municipalities of a right to refer ordinances of the municipalities to a vote of the people.

The principle that authorization must be found before a referendum can be held by a city on an ordinance enacted by such city is well established.

Honorable Robert Young

In the case of Muehring v. School District, 28 N. W. 2d 655, the Supreme Court of Minnesota held that a referendum conducted without legal authority is of no legal effect. The Court said, 1. c. 658:

"Where there is no statutory authorization for submission of a question to the voters for their decision, such a submission by a public authority clothed with power with respect to the question submitted constitutes an unauthorized redelegation of delegated power. In such a case, because the voters lack power with respect to the question submitted and because the public authority lacks the power to confer it upon them, submission of the question to the voters is without legal effect, and their decision is in no way controlling or binding."

In the case of City of Mt. Olive v. Braje, 7 N. E. 2d 851, the Supreme Court of Illinois held that there must be authorization for a referendum before one can be held. The Court said, 1. c. 853:

"The legal voters of any such municipality have no inherent or constitutional right to require the governing body to submit any legislation to a referendum. Such requirements exist only by virtue of statutory provisions which the Legislature has the right to impose or withhold. The wisdom of requiring a question to be submitted under certain circumstances, and not under others, is a matter for legislative determination, and not for the courts."

The only cities in Missouri that are authorized to hold referendums concerning ordinances are those cities which have been granted statutory power to hold referendums regarding ordinances, or cities which are authorized by the charters of such cities

Honorable Robert Young

to conduct referendums regarding ordinances.

We find no authority for the holding of a referendum in the provisions of the legislative act establishing the town of Bridgeton, such act being found at page 380, Laws of Missouri, 1842-43, approved by the Governor February 27, 1843. We do not find any statute enacted by the Legislature authorizing the town of Bridgeton to conduct a referendum upon an ordinance enacted by the city council of such city.

It is therefore our view that since there is no constitutional, statutory or charter authorization for the holding of a referendum in the town of Bridgeton, that no referendum can be held, even though a petition for a referendum is signed by certain residents of such city.

Yours very truly,

THOMAS F. EAGLETON
Attorney General